UNITED STATES
CUSTOMS COURT REPORTS

VOLUME 84

CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

January–June 1980

HJ 6624
A35
v.84

UNITED STATES CUSTOMS COURT

Chief Judge

EDWARD D. RE

Judges

PAUL P. RAO
MORGAN FORD
SCOVEL RICHARDSON
REDERICK LANDIS
JAMES L. WATSON
HERBERT N. MALETZ
BERNARD NEWMAN
NILS A. BOE

Senior Judge

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Reporter of Decisions

CONTENTS

	Page
Cases reported	v
Cases reported in Federal Supplement	vii
Decisions:	
Customs	1
Rules	217
Abstracted decisions:	
Protest	263
Reappraisement	287
Index-digest	337

CASES REPORTED

Classification

	Page
Armstrong Bros. Tool Co. et al. (American manufacturers); Daido Corporation, Steelcraft Tools Division, party in interest, C.D. 4838	16
Armstrong Bros. Tool Co. et al. (American manufacturers); Great Neck Saw Manufacturing, Incorporated, party in interest, C.D. 4848	102
Colonna & Co., Inc., C.D. 4841	51
Daido Corporation, Steelcraft Tools Division, party in interest; Armstrong Bros. Tool Co. et al. (American manufacturers), C.D. 4838	16
Deringer, A. N., Inc., C.D. 4858	196
Eddietron, Inc., C.D. 4853	158
Ferriswheel, The, C.D. 4844	61
Florsheim Shoe Co., The Division of Interco, Inc., C.D. 4835	1
G. M. Rubber Industries, Inc., C.D. 4851	127
Great Neck Saw Manufacturing, Incorporated, party in interest; Armstrong Bros. Tool Co. et al. (American manufacturers), C.D. 4848	102
Ideal Musical Merchandise Co., A Division of Ideal Instrument Co., Inc., C.D. 4843	56
Jensen, Norman G., Inc., a/c Calhoun's Collectors Society, Inc., C.D. 4846	76
Lee Enterprises, Inc., C.D. 4860	208
National Sugar Refining Company, C.D. 4849	118
Philipp Overseas, Inc., C.D. 4859	200
Porter, David E., C.D. 4857	191
Riekes Crisa Corp., C.D. 4852	132
RSMC Inc., C.D. 4847	96
Sanyo Electric Inc., C.D. 4855	167
Siemens America, Inc., C.D. 4856	180
Southern Air Transport, Inc., C.D. 4836	7
Southwest Florida Winter Vegetable Growers Association, et al., C.D. 4845	70
State Metals, Inc., C.D. 4840	51
Terra Firma Sales Co., C.D. 4842	54
U.S. International Trade Commission Investigation No. AA1921–147A (Electric Golf Cars from Poland), C.D. 4854	165

Valuation

Bernard, J. E., & Co., Inc., C.D. 4850	122
Braniff Airways, Inc., C.D. 4837	11
Majestic Electronics, Inc., C.D. 4839	38

Rules

Alberta Gas Chemicals, Inc., C.R.D. 80–1	217
Brother International Corporation, party in interest; SCM Corporation (American manufacturer), C.R.D. 80–2	227

Page
Capar Components Corp., party in interest; Sprague Electric Company (American manufacturer), C.R.D.'s 80–3, 80–6 ..... 243, 260
PPG Industries, Inc., C.R.D. 80–5 256
SCM Corporation (American manufacturer); Brother International Corporation, party in interest, C.R.D. 80–2 227
Shell Oil Co., C.R.D. 80–4 255
Sprague Electric Company (American manufacturer); Capar Components Corp., party in interest, C.R.D.'s 80–3, 80–6 ..... 243, 260

CASES REPORTED IN FEDERAL SUPPLEMENT

Alberta Gas Chemicals, Inc. *v.* United States, 84 Cust. Ct. 217, C.R.D. 80–1; 483 F. Supp. 303

Armstrong Bros. Tool Co. et al. *v.* United States (Daido Corporation, Steelcraft Tools Division, Party-in-Interest), 84 Cust. Ct. 16, C.D. 4838; 483 F. Supp. 312

Armstrong Bros. Tool Co. et al. *v.* United States (Great Neck Saw Manufacturing, Incorporated, Party-in-Interest), 84 Cust. Ct. 102, C.D. 4848; 489 F. Supp. 269

Atkins Kroll & Co., Ltd. *v.* United States, 83 Cust. Ct. 53, C.D. 4821; 484 F. Supp. 904

Border Brokerage Co., Inc. *v.* United States, 83 Cust. Ct. 97, C.D. 4825; 484 F. Supp. 901

Edge Import Corp. *v.* United States, 83 Cust. Ct. 140, C.D. 4832; 484 F. Supp. 906

Ferriswheel, The, *v.* United States, 84 Cust. Ct. 61, C.D. 4844; 489 F. Supp. 263

Majestic Electronics, Inc. *v.* United States, 84 Cust. Ct. 38, C.D. 4839; 488 F. Supp. 897

National Sugar Refining Company *v.* United States, 84 Cust. Ct. 118, C.D. 4849; 488 F. Supp. 907

SCM Corporation *v.* United States (Brother International Corporation, Party-in-Interest), 84 Cust. Ct. 227, C.R.D. 80–2; 487 F. Supp. 96

Southwest Florida Winter Vegetable Growers Association, et al. *v.* United States, 84 Cust. Ct. 70, C.D. 4845; 484 F. Supp. 910

Sprague Electric Company *v.* United States (Capar Components Corp., Party-in-Interest), 84 Cust. Ct. 243, C.R.D. 80–3; 488 F. Supp. 910

Westway Trading Corp. *v.* United States, 83 Cust. Ct. 101, C.D. 4826; 483 F. Supp. 300

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Customs

(C.D. 4835)

THE FLORSHEIM SHOE CO., DIVISION OF INTERCO, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 76-1-00138

Leather

Finished leather claimed to be properly subject to duty at 5 per centum ad valorem under item 121.57, Tariff Schedules of the United States, as modified by T.D. 68-9, as "Leather * * * finished: * * * Not fancy: * * * Other," held properly classified as "Leather * * * finished: * * * Other: Calf and kip" and, as such, dutiable at 9 per centum ad valorem under item 121.30, Tariff Schedules of the United States, as modified by T.D. 68-9.

The evidence is inconclusive as to the determination point of calf or kip in both weight of the hide and the amount of square feet obtained therefrom of finished leather.

Leather is commingled when it contains merchandise of two different tariff characters and is subject to the provisions of general headnote 7.

Average size of commingled merchandise may not be utilized in determining the rate of duty applicable thereto. *Robinson-Wagner Co., Inc.* v. *United States*, 27 Cust. Ct. 158, C.D. 1363 (1951), *aff'd*, 40 CCPA 80, C.A.D. 501 (1952).

[Judgment for defendant.]

(Decided Jan. 2, 1980)

Barnes, Richardson & Colburn (*Robert E. Burke* and *Steven P. Sonnenberg* at the trial; *Thomas D. Terpstra* with them on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Madeline B. Kuflik* at the trial and on the brief), for the defendant.

FORD, Judge: Plaintiff in this action is seeking to recover a portion of the duties paid on certain finished leather imported from France.

The merchandise was classified as calf or kip leather under item 121.30, Tariff Schedules of the United States, as modified by T.D. 68-9, which provides for duty at the rate of 9 per centum ad valorem.

Plaintiff contends the leather is not calf or kip and consequently is subject to classification under item 121.57, Tariff Schedules of the United States, as modified by T.D. 68-9, which provides for duty at 5 per centum ad valorem.

The pertinent statutory provisions read as follows:

	Leather, in the rough, partly finished, or finished:	
	* * * * * * *	
	Other:	
	Calf and kip:	
121.30	Upper	9% ad val.
	* * * * * * *	
	Other:	
	Not Fancy:	
	* * * * * * *	
121.57	Other	5% ad val.

The record consists of the testimony of four witnesses called on behalf of plaintiff. Mr. Harry Hunt, in charge of the hides and skins department of Nick Bucher & Sons Co. of Chicago, has been in the business of curing hides since 1938. William Cartmill, executive vice president of the National Tanning & Trading Co. of Peabody, Mass., whose experience in the tanning industry started in 1955 when he was with A. C. Lawrence Leather Co., where he was a raw stock buyer. Mr. Joseph A. Bistany, vice president, raw material procurement, of the Florsheim Shoe Co., has been associated with that company for over 5 years. His duties include purchasing of leather. Prior to his present employment, he was vice president, operations, of Barrett & Co , a calfskin tanner in Newark, N.J. Dr. Harland H. Young was employed by Swift & Co. in Chicago from 1932 to 1970. During this period of time he did research for the company which included curing of hides. Since 1970 he has done consulting work. The witness was active in the development of the brine-curing process.

Three witnesses were called on behalf of defendant. Mr. Vlastimil J. Surak, who for the past 25 years has been in the business of tanning in Chicago, has worked in the tanning industry in the United States and Czechoslovakia for a total of 38 years. Mr. Gustav Geisel, who is self-employed dealing in hides and skins in Chicago, has been in this field for 41 years. Mr. Milton Bailey is a civilian employed by the U.S. Navy since 1952 as a physical scientist. His duties include the development of standards relating to leather footwear for the U.S. Navy. Prior to his employment by the U.S. Navy, Mr. Bailey taught

leather technology at the College of the City of New York and from 1946 to 1952 he was employed in a tannery.

Ten exhibits were received in evidence on behalf of plaintiff and 10 exhibits for defendant as well as the record in *Florsheim Shoe Company, Division of Interco, Inc.* v. *United States*, 71 Cust. Ct. 187, C.D. 4495 (1973). The official papers were also received in evidence without being marked. The court reserved ruling on defendant's exhibit H for identification. This exhibit will be received in evidence as defendant's exhibit H as an admission against interest.

At the outset of the trial, plaintiff abandoned all entries covered by the complaint except entries 219477 and 222905. Accordingly, claims as to all entries except the above having been abandoned are dismissed.

The record establishes the production of leather requires two separate processes, to wit: Curing and tanning. According to the witnesses involved in curing, most hides are bought on a New York-trim basis. The items are then put in various packs with granulated salt or brine and remain in such condition for 30 days. The salt is used to preserve the hide by making it bacteriologically stable which prevents putrification. Moisture is drawn out by the salt which causes a weight loss of the hide of approximately 11 percent to 14 percent. Plaintiff's exhibit 2, a cured hide, weighed approximately 26 pounds before curing. After curing, it weighed 22½ pounds which weight the Government has agreed to be the weight of exhibit 2. This exhibit was withdrawn and illustrative exhibit 3, a photograph of exhibit 2, was received in evidence. A green hide or a wet hide are used synonymously and refer to an uncured hide. A cured hide is one that is biologically stable and which is ready for shipment or storage. The term "green salted" applies to the pack or pit curing, using salt on green hides without washing or fleshing.

Counsel have agreed that exhibit 4 is representative of the imported merchandise. The exhibit consists of a full skin which has been tanned. Exhibit 5 is representative of the product described on the invoices as black box. Exhibits 6 and 7 represent merchandise known as smooth calf. Each piece of leather is marked with the size by the tanner which permits the purchaser to determine whether he has received the amount of leather ordered. The sizes stamped on exhibits 4, 5, 6, and 7 are 20¼ square feet, 22½ square feet, 20½ square feet, and 22½ square feet, respectively.

Photocopies of the adding machine tapes contained in exhibits 8 and 9 are copies of the tapes supplied by the tanner. Each bundle or pallet of skins has the tape attached to the top skin and represents the amount of square feet contained in the bundle or pallet.

The consensus of opinion with respect to the square footage of a 25-pound skin is that it would amount to less than 20 square feet. Cured

hides are sold by the pound and finished or tanned leather is sold by the square foot. Yield is the amount of square feet of finished leather obtained from a cured hide. The testimony in respect to yield is contradictory since each tanner has his own process which may yield more or less square feet per hide.

Tanning was described by plaintiff's witness, Cartmill, as requiring soaking which in effect places the material back in the green state. A depilatory or hair remover is utilized to remove the hair from the skin. It is then baked, pickled, and tanned. After tanning, it is wrung out on a machine to eliminate some of the moisture. It is next shaved on the flesh side and is graded and colored. The material is subsequently dried by one of three methods. After drying, it is stacked to soften it into a more natural pliable form for finishing. The witness indicated that finishing a piece of leather is like finishing a piece of fine wood. The tanner might use one, two, three, or four coats. It is glazed by utilizing heat and friction to polish the skin. After completion of this process, it is trimmed and graded and packed for shipment.

The basic issue presented for determination is the cutoff point in weight of the hides and the square footage of the finished leather. Plaintiff contends the weight of 25 pounds or less is the recognized point as judicially determined in *Josaf Haberman* v. *United States*, T.D. 18739, G.A. 4052 (1897) and *Jos. Hecht & Sons* v. *United States*, T.D. 19716, G.A. 4215 (1898). In the latter case, the findings of fact were as follows:

> (1) That the goods were all imported under the present tariff act of 1897, being assessed for duty under paragraph 437 of said act as "hides of cattle."
>
> (2) That the raw skins all weigh less than 25 pounds each, and are in fact raw calfskins, and were so commercially known in the trade of this country on and before July 24, 1897.
>
> (3) That the dry skins all weigh less than 12 pounds each.
>
> (4) That commercially the dividing line between raw cowhides and calfskins, in *weight*, is 25 pounds, the term "calfskins" including all so-called hides or skins which weigh less than 25 pounds. When *dry*, the dividing line is 12 pounds, all weighing *less* than 12 pounds being commercially known as skins, and all weighing 12 pounds or over as hides.

It is noted in the decision of the *Hecht* case that "[s]uch distinction has been recognized in the tariff legislation of Congress for more than 40 years."

With respect to the question of weight, while the testimony of plaintiff's witnesses and defendant's witness Surak agreed the 25-pounds-or-under designation applied to kip, defendant's witness Geisel considered a weight of 30 pounds to be kip. Bailey agreed to the 30-pound figure and his later testimony expanded the weight to 35 pounds for kip. This testimony of defendant's witnesses Geisel

and Bailey appears to be based on their experience and the definitions contained in the ASTM designation D 1517–67, which was promulgated in 1967 and received in evidence as defendant's exhibit F, as well as defendant's exhibit I, the "Federal Test Method Standard," dated 1969. Defendant's exhibit E entitled "Military Standard Visual Inspection Guide for Footwear Upper Leather" (MIL–STD–663B), which was issued in 1971, indicates the square footage of calf and kip leather. Defendant, therefore, contends the weight and square footage has increased over the years and the importations are dutiable as classified.

It is to be noted that there is a difference of opinion as to the determination point of weight, as well as a lack of unanimity of opinion as to whether 20 square feet is the determination point for finished leather. This is due to the fact that the weight determination point according to the evidence may vary from under 25 to 35 pounds, thus resulting in various yields of square footage of the finished leather. In addition, the testimony with respect to tanning does not give a specific formula which may be utilized in determining the yield of the square footage of leather from the weight of the hide. The record further indicates that tanners utilize their own processes which may result in a yield of more or less square footage based upon the same weight.

Plaintiff further contends such distinction is presently recognized in the trade and that it has established a commercial designation. Where words used in tariff acts to designate particular kinds or classes of goods have well-known significance in the trade and commerce which differ from the common meaning, the commercial meaning prevails. *Maddock* v. *Magone*, 152 U.S. 368 (1894); *Jas. Akeroyd & Co. et al.* v. *United States*, 15 Ct. Cust. Appls. 440, T.D. 42641 (1928). Proof of commercial designation is a question of fact to be established in each case. *Daniel Green Shoe Co.* v. *United States* (*Trans World Shoe Corp., Party in Interest*), 58 Cust. Ct. 7, C.D. 2868, 262 F. Supp. 375 (1967), *appeal dismissed*, 54 CCPA 143. The record before the court fails to establish a commercial designation. It is incumbent upon the party alleging commercial designation to establish that such designation was definite, general, and uniform throughout the United States on or about the date of the enactment of the tariff legislation involved. *United States* v. *Armand Schwab & Co., Inc., et al.*, 30 CCPA 72, C.A.D. 218 (1942).

The second matter for determination is whether the imported leather, which arrived in bundles or pallets and contained leather both over and under 20 square feet, should be considered as claimed based upon the average size of the leather contained in the bundle or pallet. Plaintiff contends the average size of the leather contained in each bundle should be utilized since leather is dealt with in the trade

based upon an average. Plaintiff also brings to the court's attention that the testimony relating to weight for calf or kip was given in a range of weight in which the witnesses indicated an average weight.

Defendant takes the position that merchandise which contains various sizes, over and under 20 square feet, is commingled. According to general headnote 7 of the Tariff Schedules of the United States, commingled merchandise is subject to the highest rate of duty applicable to such merchandise unless the merchandise is segregated. The pertinent portions of general headnote 7 provide as follows:

> 7. *Commingling of articles.*—(a) Whenever articles subject to different rates of duty are so packed together or mingled that the quantity or value of each class of articles cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by one or more of the following means:
>
> (i) sampling,
>
> (ii) verification of packing lists or other documents filed at the time of entry, or
>
> (iii) evidence showing performance of commercial settlement tests generally accepted in the trade and filed in such time and manner as may be prescribed by regulations of the Secretary of the Treasury,
>
> the commingled articles shall be subject to the highest rate of duty applicable to any part thereof unless the consignee or his agent segregates the articles pursuant to subdivision (b) hereof.

Assuming *arguendo* that the determination point in weight was 25 pounds or less and the square footage point was 20 square feet or less, since the merchandise contains under and over 20 square feet it is for tariff purposes commingled. It is further apparent that there has been no segregation of the merchandise and, therefore, it is dutiable at the highest rate applicable to the merchandise as prescribed by general headnote 7.

The question of utilizing averages was considered in *Robinson-Wagner Co., Inc.* v. *United States*, 40 CCPA 80, C.A.D. 501 (1952). In the *Robinson* case, certain wool grease was classified as wool grease suitable for medicinal use. The merchandise was imported in drums, some of which was of one tariff character, as classified, and some of another tariff character, wool grease containing 2 percent or less of free fatty acids and not suitable for medicinal use. The court in considering the question of average samples made the following observations:

> It will be remembered that the merchandise was imported in drums and from the record it is reasonable to believe that the contents of the individual drums differ in their chemical composition.
>
> It seems to us, as was argued by counsel for the Government, that if a drum of grease, such as was sampled by the Customs

officials, were to be mixed with one or any number of drums containing less than the components and character of adeps lanae, the result of such composite sample would probably in some degree conform to the samples and analyses made by employees of appellant in their tests. Therefore, we agree with the reasoning in the decision of the trial court that the composite sample representing an average, must be of lesser quality than the contents of the drums which held the better quality of the shipment.

The Customs Court in its decision in the *Robinson* case, 27 Cust. Ct. 158, C.D. 1363 (1951), made the following pertinent observation which likewise applies to general headnote 7:

> We are not unmindful of the fact that the plaintiff may have ordered and expected to receive wool grease not suitable for medicinal use, and that the average of the entire shipment actually was just such wool grease. The fact is, however, that the shipment was packed in drums, and the evidence establishes that some of the drums contained wool grease of the highest class. The policy of the law in such cases is indicated by section 508 (Tariff Act of 1930), *supra*, and is to assess duty, not upon the average of the classes of merchandise in a shipment, but upon the highest class thereof if the classes involved can be segregated and the segregation is not done.

Accordingly, in the absence of segregation, the merchandise was properly classified.

Judgment will be issued accordingly.

(C.D. 4836)

SOUTHERN AIR TRANSPORT, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 75-6-01590

Transportation Equipment (DC-6B Airplane)

AMERICAN GOODS RETURNED—CUSTOMS REGULATIONS—NON-COMPLIANCE

A Douglas DC-6B airplane imported at Miami, Fla., from Taiwan and classified in liquidation as entered under TSUS item 694.40 as a *used* or rebuilt airplane, *Held*, not classifiable as claimed under TSUS item 800.00 as a *product* of the United States or under TSUS item 807.00 as an *article assembled* with U.S. components where the importer failed to plead and prove compliance with or waiver of applicable Customs Regulations associated with duty-exempt entries, and the evidence establishes that the aircraft would not qualify for duty exemption by reason of modifications made abroad which increased its value, and by reason of the absence of *assembly abroad*.

[Dismissed.]

(Decided Jan. 4, 1980)

Howard, Poe & Bastian (*James H. Bastian* at the trial and on the brief) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Sidney N. Weiss* at the trial and on the brief), for the defendant.

RICHARDSON, Judge: This action involves the dutiable status of a Douglas DC–6B airplane bearing manufacturer's serial No. 44550 and U.S. Federal Aviation Administration registration No. N93459. The plane was imported at Miami, Fla., from Taiwan on October 1, 1973, and entered and classified in liquidation as a *used* or *rebuilt* airplane under TSUS item 694.40 at the duty rate of 5 *per centum ad valorem*. Plaintiff-importer claims that the aircraft should be classified under TSUS item 800.00 as a *product* of the United States not advanced in value or improved in condition, duty free, or, in the alternative, under TSUS item 807.00 as an *article* assembled abroad with U.S. components, with duty assessed only on the value of foreign labor.

The operative facts in the case are not in dispute. The record shows that the plane was purchased new from the Douglas Aircraft Co., Inc., in 1958 by Asiatic Aeronautical Co., Ltd. (AACL), later known as Air Asia Co., Ltd., for $1.6 million, and immediately exported to Taiwan, Republic of China, for use in the operation of a scheduled airline service of which AACL was part owner. For some 15 years the plane was operated as a combination passenger-light cargo aircraft in the Far East. In August 1973, the plane was acquired by plaintiff by purchase from Air America, Inc., the parent corporation of AACL, for $134,500. Plaintiff then expended some $44,611.50 in labor and material costs to have work performed on the plane in Taiwan, after which the plane was returned to the United States where it was entered as aforesaid.

Some of the work performed in Taiwan on the plane prior to importation entailed replacement of main cabin flooring with stronger flooring, replacement of fore and aft passenger doors in the main cabin with larger cargo doors which necessitated opening and modifying the fuselage to accommodate the larger doors, the removal of the overhead passenger hatrack in the main cabin, the removal of two toilets and a coatroom in the forward main cabin, the substitution of a bucket-type, portable toilet in the rear main cabin for the more sophisticated toilet originally installed there, and the substitution of a movable galley for the stationary galley and tray container storage area originally built into the main cabin.

The object of these modifications was said to be the preparation of the plane for a combination cargo-passenger service stateside with emphasis, insofar as cargo carrying capacity is concerned, on the

carriage of larger, bulkier cargo on the main deck within existing payload limits. The modifications resulted in a reduction of the aircraft's passenger capacity from a 73-seat configuration to a 27-seat configuration.

The factual underpinnings in the case are amply covered by allegations in plaintiff's pleading. Noticeably absent from the amended complaint, however, is any reference to compliance with requisite Customs Regulations relative to item 800.00 or 807.00 entry. On the other hand, defendant alleged in an affirmative defense in its answer the fact of plaintiff's noncompliance with applicable Customs Regulations relating to an item 800.00 or 807.00 entry. And, at the conclusion of plaintiff's case, defendant moved to dismiss the action for "failure to state a prima facie case" (R. 89). The court reserved decision on the motion.

In its brief, plaintiff does not address itself to the matter of compliance with applicable Customs Regulations. And on this phase of the case, defendant argues in its brief that compliance with appropriate Customs Regulations is a condition precedent to recovery under items 800.00 and 807.00, and asserts that plaintiff has not complied with the regulations. The court agrees with defendant.

Exemption from duty on imported merchandise in whole or in part is not absolute under the TSUS. Such an exemption is conditioned upon compliance with applicable Customs Regulations (general headnote 11, TSUS; headnote 1, schedule 8, TSUS; secs. 10.1 and 10.2 of the Customs Regulations (19 CFR secs. 10.1, 10.2)), unless compliance has been waived by the appropriate Customs official. Section 10.1 requires the filing of (1) a foreign shipper's declaration, (2) an owner's declaration on Customs form 3311, and (3) a district director's certificate of exportation on Customs form 3311, in connection with an item 800.00 entry. And section 10.2 requires the filing of (1) a foreign assembler's declaration, and (2) an owner's endorsement on the assembler's declaration, in connection with an item 807.00 entry. See *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937). In the instant case, plaintiff neither pleaded nor proved compliance with or waiver of the documentary requirements of either section 10.1 or section 10.2 of the Customs Regulations. Plaintiff has not even addressed itself to the issue of regulatory compliance raised in defendant's affirmative defense, and also, by implication, on the motion to dismiss.

In fact, plaintiff has, in effect, undertaken to *bypass* the regulatoay compliance issue when it made a *dutiable* entry of the aircraft. *Cf. McDonnell Douglas Corp.* v. *United States*, 75 Cust. Ct. 6, 13–14, C.D. 4604 (1975), *decided on rehearing*, 78 Cust. Ct. 92, C.D. 4692 (1977). However, plaintiff cannot properly assert its claim for duty exemp-

330-630 O - 81 - 2

tion on the aircraft for the first time in court, absent a late filing of the requisite documents. See *Mattel, Inc.* v. *United States*, 82 Cust. Ct. 234, C.D. 4805 (1979), *appeals pending*, where there was an obligation to assert it initially at the administrative level. As our appellate court said in *Maple Leaf Petroleum, Ltd., supra*, at page 9, "The party asking the special grant or favor (duty exemption), of course, would be required to make a showing of the essential facts required by the regulation to the collector at the time of entry and not in the way of evidence at some subsequent trial."

But even if the exemption supporting documents had been filed with the district director initially under an item 800.00 or 807.00 entry in accordance with the regulations, or their filing waived by the district director as he is now empowered to do under these regulations (see sec. 10.1 (d) and (g) of the Customs Regulations (19 CFR sec. 10.1 (d) and (g)), or subsequently filed with the court by leave of court under the late filing of documents provision, the court would be disinclined, as a matter of law, to accord the aircraft the duty exemption now sought by plaintiff here, given the facts of record concerning the extensive work performed on the aircraft in Taiwan prior to its departure for the United States on the voyage of importation.

Discounting the fact that the installation of cargo window bars in the main cabin of the plane was an item wholly of *foreign manufacture*, the contracting parties themselves regarded the installation of cargo doors and heavy flooring in the main cabin to be items of major importance. Thus, the contract read as to such items: "Such materials and drawings must meet USFAA standards for major alterations being accomplished in accordance with previously approved data (STC's)." And, although it is true that the aircraft possessed only residual value at the time of these alterations, and, further, that a number of facilities built into the aircraft for passenger convenience and comfort were simultaneously removed, i.e., galley and tray container storage, hatracks, toilets, and coatroom, the alterations, nevertheless, resulted in a change in condition which increased its residual value in the court's opinion.

The realities of the marketplace force the conclusion that the days for commercial passenger service for this vintage piston-engine, propeller-driven airplane were numbered even at the time of its acquisition by plaintiff. In the Far East, the plane had already been replaced in regularly scheduled commercial flights by a newer, larger aircraft, thus relegating it to unscheduled (supplemental) flights or charter service. Now, destined for service stateside after some 15 years of service abroad, the plane faced an even bleaker future here in competition for passenger service with jet aircraft in a jet-age, technology-oriented society. Hence, against this almost certain future,

the alterations performed on the plane in Taiwan prior to its departure for the United States must be viewed as equipping it to perform a more useful cargo service here which was calculated to increase its earning capacity, and thereby postpone obsolescence. Obviously, therefore, the refurbished airplane had increased value which would disqualify it for item 800.00 treatment notwithstanding its domestic origin.

And neither would the aircraft qualify for item 807.00 treatment since it was never an *assembled article* within the meaning of that provision. From the time of its manufacture until it underwent modification in Taiwan the plane remained a complete and functional article of commerce. At best, only some of its existing parts and components, i.e., flooring and doors, were removed and replaced while the plane was abroad. However, the plane itself was never *assembled* abroad from *fabricated components* of U.S. origin.

For the reasons stated, defendant's motion to dismiss is granted. Judgment will be entered herein accordingly.

(C.D. 4837)

BRANIFF AIRWAYS, INC., PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

Court No. 75–3–00646

Memorandum Opinion Accompanying Order

[Defendant's motion for rehearing denied.]

(Dated January 17, 1980)

Arnold & Porter (*Paul S. Berger* and *Kenneth A. Letzler* on the brief), for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*James A. Resti* on the brief), for the defendant.

BOE, Judge: The above-entitled action has been submitted to this court by the respective parties pursuant to a stipulation of fact and submission filed under date of May 31, 1979. In said document it is specifically provided:

> It is further agreed and stipulated by and between counsel for Braniff and the Assistant Attorney General for the United States that:
>
> This case be submitted on the pleadings heretofore filed in this case and this stipulation; * * *.

The question of law presented by the parties entailed whether a manufacturer's negotiated warranty with respect to certain aircraft

made in and exported from Great Britain may be included in the appraised constructed value of the said aircraft upon entry into the United States. Neither the pleadings nor the accompanying stipulation provide nor reflect facts as to the determination of general expenses and profit on the basis of constructed value required in section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a).

In an order made and entered under date of November 14, 1979, this court determined:

> In view, therefore, of the existence of a genuine issue of material facts remaining in connection with the determination of the appraised constructed value of the subject merchandise, judgment on the pleadings and on the accompanying stipulation of facts filed herein cannot be granted; * * *.

In a motion for rehearing filed under date of November 30, 1979, the defendant contends that judgment should be entered for the defendant for the reason that by the omission in the pleadings and the stipulation of the facts required to be established by subsection 2 of section 401(d) of the Tariff Act of 1930, as amended (constructed value statute), the plaintiff has failed to overcome the presumption of correctness attaching to the liquidated appraisement of the merchandise in issue. In support of its contention the defendant relies on the decisions of this court and our appellate court in the cases of: *American Mail Line, Ltd.* v. *United States*, 35 Cust. Ct. 142, C.D. 1735 (1955); *Dorward & Sons Co., Pacific Vegetable Oil Corp.* v. *United States*, 40 CCPA 159, C.A.D. 512 (1953); *Dana Perfumes Corp.* v. *United States*, 63 CCPA 43, C.A.D. 1162, 524 F. 2d 750 (1975).

It is true that the evidence presented to the court therein consisted either in whole or in part of a stipulation of facts between the parties. Notwithstanding that it is acknowledged that a party may be bound by facts to which it has stipulated in the same manner as it is bound by the oral testimony of witnesses which may have been presented, this court is of the opinion that the rule of law expressed in the aforecited decisions are neither applicable to nor determinative of the motion presently urged by the defendant. In each of said decisions it will be noted that the cause of action was tried and submitted to the court for final determination on the merits. In the presentation of its evidence the plaintiff necessarily must be aware that the court possesses the judicial discretionary authority to determine the case upon the evidence submitted, irrespective of the sufficiency thereof. The decisions relied upon by the defendant, therefore, can be viewed only as an affirmation of the exercise of such discretionary power by the trial court, notwithstanding that subsequent to the entry of judgment it might appear that an order of remand or rehearing could have provided

the opportunity for the presentation of additional material evidence. Had this court been faced after a full evidentiary trial with the record as it now stands, that is, a set of pleadings and a stipulation of facts, a situation similar to that presented in *Dorward*, it may have concluded that it was appropriate to decide the case on the merits on the basis of the record before it.

However, the posture of the present action at the time of the entry of this court's order under date of November 14, 1979, denying judgment on the pleadings and accompanying stipulation of facts is far different from an action wherein the court has accepted the same for final determination and, accordingly, has so rendered its decision on the merits, irrespective of whether such an adjudication has been made on evidence submitted on the oral testimony of witnesses or on a stipulation of facts agreed upon by the parties.

What then is the true posture of the present proceeding?

Under the rules of the Customs Court, a cause of action may be determined, other than by an evidentiary trial, by the following:

(1) Submission on agreed statement of facts as provided by rule 8.1;

(2) Judgment on the pleadings as provided by rule 4.9; and

(3) Summary judgment as provided by rule 8.2.

It is patently evident that the submission to this court on the pleadings and the accompanying stipulation of facts in the above-entitled action is not within the purview nor intent of rule 8.1. As clearly contemplated by section (a) of the rule, this procedure is intended to be utilized only in such cases wherein an agreed settlement of an action has been made by the parties. As further provided by the rule such a statement of agreed settlement together with a proposed decision and judgment shall be submitted to the court. No decision by the court is required other than the approval of the statement of agreed settlement by the entry of the proposed decision and judgment which has been submitted in connection therewith.

The stipulation filed in the above-entitled action has been accepted by this court, in accordance with the specific terms thereof, as a submission on the pleadings together with the accompanying stipulated facts within the purview of rule 4.9. The foregoing rule clearly defines the manner in which such a submission shall be treated by providing in pertinent part:

> * * * If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and are not excluded by the court, the motion *shall* be treated as one for summary judgment and shall be disposed of as provided in rule 8.2, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by rule 8.2. [Italic supplied.]

It would appear clear that the stipulation of facts submitted to this court in conjunction with the submission on the pleadings indeed are "matters outside the pleadings" within the contemplation of the aforequoted rule and that, accordingly, the court is without discretion but to treat the submission as one for summary judgment. *See Transamerican Electronics Corp.* v. *United States*, 70 Cust. Ct. 35, C.D. 4405 (1973).

The provisions of rule 8.2 provide that summary judgment may be rendered in favor of any party entitled thereto as a matter of law "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" (rule 8.2(d)). Practice in the Customs Court repeatedly has been punctuated by a denial of summary judgment where the court in its discretion has found a genuine issue of material fact to exist.

Predicated on the foregoing, this court in its prior order denying judgment on the pleadings and the accompanying stipulated facts submitted by the parties has found that an issue as to a material fact exists. In short, this court has determined that the action is not "ripe" at this time for an adjudication of the question of law concerning which the respective parties mutually seek a decision.[1] The conduct of this court in so doing is dictated by the rules of procedure established herein as they may be applied to the specific proceedings brought before it, not by what might have been the otherwise subjective intent of counsel.

In the case of *C. J. Tower & Sons of Buffalo, Inc., a/c Metco, Inc.* v. *United States*, 68 Cust. Ct. 377, C.R.D. 72–11 (1972), Judge Herbert Maletz of this court in a well-reasoned and comprehensive opinion has examined the effect of denial of judgment on the pleadings upon the right of a party to subsequently prove facts necessary to sustain its claim. Although in the *Tower* case cross-motions were presented by the respective parties, the reasoning of the court is completely applicable to the proceedings at bar. The court in its decision stated:

> It is important to add, however, that although plaintiff proceeded on the wrong legal theory, it does not necessarily follow that it is precluded from proving the facts necessary to establish its claim or that defendant is thereby entitled to judgment on its cross-motion. *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101 (CA8 1943); *Ideal Development Co.* v. *Costello*, 217 F. Supp. 365 (E.D. Pa. 1963). In this latter connection, the test, on defendant's motion for judgment on the pleadings (or summary judg-

[1] This discretionary judicial prerogative is not without precedent. In the case of *United States* v. *H. A. Gogarty, Inc., a/c A. H. Walter & Co., Inc.*, 42 Cust. Ct. 680, R.D. 9468 (1959), Judge Donlon of this court, "in the interest of justice," set aside a stipulation of facts as insufficient to permit a determination of the action before the court and restored the case to the trial calendar for the presentation of such additional proof as might be required.

ment), is whether, viewing the pleaded facts in the light most favorable to plaintiff, there is any basis upon which the latter might recover. In other words, the opposing party must be given the benefit of all reasonable inferences favorable to it which might be drawn from the pleadings. *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962); *Empire Electronics* v. *United States*, 311 F. 2d 175 (CA2 1962); *National Labor Relations Board* v. *Weirton Steel Company*, 146 F. 2d 144 (CA3 1944); *Ramsouer* v. *Midland Valley R. Co.*, *supra*, 135 F. 2d 101. If it is at all possible that plaintiff may be able to meet its burden of proof, it is inappropriate to grant judgment against it. *Williams* v. *Chick*, 373 F. 2d 330 (CA8 1967); *Melo-Sonics Corp.* v. *Cropp*, 342 F. 2d 856 (CA3 1965); *Dotschay* v. *National Mutual Ins. Co. of District of Columbia*, 246 F. 2d 221 (CA5 1957); *Dyson* v. *General Motors Corporation*, 298 F. Supp. 1064 (E.D. Pa. 1969).

Considering the present pleadings with the foregoing in mind, it cannot be said with any degree of certainty that plaintiff would be unable to offer proofs tending to establish the ultimate facts necessary to support its claim for classification of the merchandise as nickel powder under item 620.32, specifically, that it is a nickel alloy in a basic shape or form. This being the situation, plaintiff should not be foreclosed from the opportunity to present its proofs. *Melo-Sonics Corp.* v. *Cropp*, *supra*, 342 F. 2d 856; *Williams* v. *Chick*, *supra*, 373 F. 2d 330. [Italics in original; emphasis supplied.]

The acceptance of the contention of the defendant inevitably would lead to the fallacious ultimate conclusion that notwithstanding the nature of any proceeding, whether it be in the form of judgment on the pleadings or in the form of summary judgment, a stipulation of facts between parties would require the entry of judgment for the defendant if, in such a stipulation, the absence or omission of any material fact precludes the plaintiff from overcoming the presumption of correctness attaching to the liquidated appraisement or classification. Such a conclusion would destroy the basic and fundamental obligation of a trial court, namely—to determine when a cause of action is "ripe" for the determination of a question of law that might have been presented by the parties. It likewise would destroy and leave valueless the very purpose and intent contemplated by our respective procedures for summary determinations. If a party in attempting to seek a speedy adjudication by presenting its action to the court for possible determination by means of judgment on the pleadings or summary judgment finds itself precluded from offering further evidence which the court believes necessary to the ultimate determination of the action, future resort to such procedures most assuredly could not be expected to be utilized.

The plaintiff in its response to defendant's motion for rehearing has indicated its willingness and ability to provide the proof required by the statute. It is indeed difficult to perceive wherein the rights of the

defendant are prejudiced by the resolution of an existing material issue of fact in the manner as prescribed by rule 8.2 prior to the adjudication of the question of law involved herein. In conformity, therefore, with the provisions of rule 8.2(e), after having had a further opportunity to confer with respective counsel, the court may ascertain what material facts, if any, in good faith continued to be in issue and with the agreement of counsel provide for the presentation of further stipulations, affidavits, or other evidence for the resolution of such material facts remaining in issue in order to expeditiously permit the adjudication of the question of law originally presented by the parties for determination by this court; now therefore, it is hereby

ORDERED that the motion of the defendant for rehearing of the order of this court made and entered on the 14th day of November, 1979, denying judgment on the pleadings and the accompanying stipulated facts submitted by the parties be and is hereby denied.

(C.D. 4838)

ARMSTRONG BROS. TOOL CO.; BERGMAN TOOL MANUFACTURING CO., INC.; DURO METAL PRODUCTS COMPANY; MILWAUKEE TOOL & EQUIPMENT CO., INC.; H. K. PORTER, INC.; PROTO TOOLS DIVISION, INGERSOLL RAND COMPANY; TOOL GROUP, DRESSER INDUSTRIES, INC.; AND THE WRIGHT TOOL & FORGE COMPANY, PLAINTIFFS *v.* UNITED STATES (DAIDO CORPORATION, STEELCRAFT TOOLS DIVISION, PARTY-IN-INTEREST), DEFENDANT

On Plaintiffs' Motion and the Cross-Motions by Defendant and Party-in-Interest for Summary Judgment

Court No. 77-8-02005

[Plaintiffs' motion denied; cross-motions by defendant and party-in-interest granted.]

(Dated January 28, 1980)

Frederick L. Ikenson, Esq., for the plaintiffs.

Alice Daniel, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *Sidney N. Weiss*, trial attorney, Esqs., for the defendant.

Tanaka Walders & Ritger, Esqs. (*H. William Tanaka, Lawrence R. Walders* and *Wesley K. Caine*, Esqs., of counsel) for the party-in-interest.

NEWMAN, Judge:

INTRODUCTION

Plaintiffs, American manufacturers and/or wholesalers of certain hand tools, contest the negative injury determination of the U.S.

Tariff Commission (Commission)[1] in "Wrenches, Pliers, Screwdrivers, and Metal-Cutting Snips and Shears From Japan," investigation No. AA1921–141 (39 F.R. 38133 (1974)), under the Antidumping Act of 1921, as amended (19 U.S.C. 160, et seq. (1970)). This action has been brought under the provisions of 28 U.S.C. 1582(b) (1976), 28 U.S.C. 2632(a) (1976) and 19 U.S.C. 1516(c) (1976). Daido Corp., Steelcraft Tools Division, the party-in-interest, is the consignee of New York, N.Y., consumption entry No. 77–471888, covering merchandise which falls within the description "wrenches, pliers, screwdrivers, and metal-cutting snips and shears from Japan."[2]

In this action, plaintiffs seek to overturn the negative injury determination reached by the Commission on October 21, 1974, viz, that "an industry in the United States is not being injured or is not likely to be injured, or is not prevented from being established, by reason of the importation of wrenches, pliers, screwdrivers, and metal-cutting snips and shears from Japan that are being, or are likely to be, sold at less than fair value [LTFV] within the meaning of the Antidumping Act of 1921, as amended."[3] Specifically, plaintiffs allege that the Commission's negative injury determination is erroneous as a matter of law, is arbitrary and capricious, and is not supported by substantial evidence. Plaintiffs seek an order setting aside the Commission's determination and directing the Secretary of the Treasury to publish a finding of dumping, with the result that dumping duties will be assessed, where appropriate, on entries of the subject hand tools from Japan.

This action is presently before me on plaintiffs' motion for summary judgment, and the cross-motions for summary judgment by defendant and the party-in-interest. The parties assert there is no genuine issue of fact. I have studied the massive administrative record and the excellent memoranda of law submitted by counsel; and for the reasons hereinafter expressed, I find that no justiciable issue of fact is presented in this case, and that defendant and the party-in-interest are entitled to summary judgment dismissing this action.

STATUTES INVOLVED

The statutory provisions relevant to this action are:

Section 201, Antidumping Act of 1921, as amended, 19 U.S.C. 160 (1970):

> Initiation of investigation; injury determination; findings; withholding appraisement; publication in Federal Register
>
> (a) Whenever the Secretary of the Treasury (hereinafter called the Secretary) determines that a class or kind of foreign mer-

[1] The U.S. Tariff Commission was subsequently renamed the U.S. International Trade Commission by section 171(a) of the Trade Act of 1974. (19 U.S.C. 2231(a) (1976).)

[2] Pursuant to 19 U.S.C. 1516(f) (1976) the consignee or his agent has the right to appear and be heard as a party in this civil action.

[3] Preliminarily, the Treasury Department determined that the subject hand tools from Japan are being, or are likely to be, sold in the United States at less than fair value within the meaning of the Antidumping Act, 1921, as amended.

chandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the U.S. Tariff Commission, and the said Commission shall determine within 3 months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in secs. 160 to 171 of this title called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the U.S. Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative.

Section 202(a), Antidumping Act of 1921, as amended, 19 U.S.C. 161(a) (1970):

Amount of duty to be collected; determination of foreign market value of goods

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160

of this title, entered, or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

Section 516, Tariff Act of 1930, as amended, 19 U.S.C. 1516 (1976):

Petitions by American manufacturers, producers, or wholesalers

(a) Classification, rate of duty, countervailing duty, and antidumping duty furnished upon request; petition; contents

The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as countervailing duties), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as antidumping duties), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties or antidumping duties should be assessed.

(b) Determination of petition; notification to petitioner; procedures for countervailing duties and antidumping duties

If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly CUSTOMS BULLETIN shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty

purposes, the procedures set forth in section 160 of this title shall apply.

(c) Determination of correctness of initial appraised value, classification, rate of duty, or non-assessment of countervailing duties or antidumping duties; contest by petitioner; procedure

If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than 30 days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure to assess countervailing duties or antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

(d) Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid

Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the U.S. Customs Court contesting such determination.

(e) Appraisal, classification, and liquidation of entries of merchandise covered by published decisions of the Secretary

Notwithstanding the filing of an action pursuant to section 2632 of title 28, merchandise of the character covered by the pub-

lished decision of the Secretary (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the U.S. Customs Court or of the U.S. Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(f) Consignee or his agent as party in interest before the Customs Court

The consignee or his agent shall have the right to appear and to be heard as a party in interest before the U.S. Customs Court.

(g) Appraisement, classification, and assessment of duty of merchandise covered by published decision of the Secretary in accordance with final judicial decision of Customs Court or Court of Customs and Patent Appeals sustaining cause of action in whole or in part; suspension of liquidation of entries

If the cause of action is sustained in whole or in part by a decision of the U.S. Customs Court or of the U.S. Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

(h) Regulations implementing required procedures

Regulations shall be prescribed by the Secretary to implement the procedures required under this section.

ISSUE PRESENTED

The core issue is whether the Commission's negative determination was arbitrary, capricious or otherwise contrary to law.

BACKGROUND

To put the Commission's determination in proper perspective, it would be helpful at this juncture to briefly set forth the procedures applicable under the Antidumping Act as succinctly summarized by Judge Maletz in *Voss International Corp.* v. *United States*, 78 Cust. Ct. 130, 131, n. 1, C.D. 4698, 432 F. Supp. 205 (1977):

> The Antidumping Act provides in general that if a foreign exporter sells merchandise to the United States at a price less than its "fair value," i.e., the price charged by the exporter in his home market—with resultant injury to a U.S. industry—a special dumping duty will be assessed upon the importation of the merchandise. If the exporter and importer are not related, this duty is measured by the difference between the higher

"foreign market value" and the lower price charged the U.S. importer. The question as to whether merchandise is being sold at less than fair value is determined by the Secretary of the Treasury. If the Secretary makes an affirmative finding in this regard, the question as to whether there is injury is determined by the U.S. Tariff Commission (now known as the U.S. International Trade Commission). If the Commission makes a determination of injury, the Secretary makes and publishes a finding of dumping. See, e.g., *F. W. Myers & Co., Inc., et al.* v. *United States*, 72 Cust. Ct. 219, 220, C.D. 4544, 376 F. Supp. 860, 862 (1974).

The court's jurisdiction under 19 U.S.C. 1516(c) to review the Commission's negative injury determination is not in dispute. In view of Chief Judge Re's well-reasoned opinion in *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78–2, 450 F. Supp. 1178 (1978), there can be no doubt that the Customs Court, rather than the district courts, has exclusive jurisdiction to review a negative injury determination by the Commission under the Antidumping Act. See also my opinions in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Great Neck Saw Manufacturing, Incorporated, Party-in-Interest*), 80 Cust. Ct. 160, C.D. 4751, 453 F. Supp. 889 (1978), *modified on rehearing*, 81 Cust. Ct. 162, C.R.D. 78–14 (1978); and *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 81 Cust. Ct. 168, C.R.D. 78–18, 462 F. Supp. 966 (1978).

The highlights of the administrative history of this action are undisputed, and may be briefly summarized:

1. On September 25, 1973, an antidumping proceeding notice issued by the Treasury Department was published in the Federal Register (38 F.R. 26738 (1973)), advising that an investigation was being instituted to determine whether certain "Non-Powered Hand Tools From Japan" were being or were likely to be sold at LTFV.

2. On March 25, 1974, a withholding of appraisement notice was published in the Federal Register (39 F.R. 11122 (1974)).

3. On June 21, 1974, the Treasury Department published in the Federal Register a determination of sales at LTFV covering "Non-Powered Hand Tools From Japan" (39 F.R. 22287 (1974)); and on July 23, 1974, the Treasury Department published in the Federal Register an amendment to the aforementioned determination, restricting its scope to wrenches, pliers, screwdrivers, and metal-cutting snips and shears from Japan (39 F.R. 26758 (1974)).

4. On July 30, 1974, the Commission published in the Federal Register a notice of its investigation No. AA1921–141, and of a public hearing in which all parties would be "given an opportunity to be present, to produce evidence, and to be heard" (39 F.R. 27614 (1974)). Thereafter, on August 20–23, 1974, the Commission held

a hearing at which testimony and exhibits were received. All public testimony was subject to cross-examination; and subsequently the Commission received post-hearing briefs.

5. On October 21, 1974, a negative injury determination was reached by the unanimous vote of five Commissioners, namely, Chairman Bedell, Vice Chairman Parker, and Commissioners Moore, Ablondi, and Leonard. Commissioner Minchew did not participate in the decision.

6. On October 29, 1974, the Commission published its negative injury determination in the Federal Register, together with a statement of reasons. Commissioner Leonard submitted a separate statement of reasons (39 F.R. 38133 (1974)).

In arriving at its determination, "the Commission gave due consideration to all written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission's staff from questionnaires, personal interviews, and other sources." *Id.*

No question has been raised concerning plaintiffs' compliance with the administrative prerequisites to the initiation of a civil action prescribed by 19 U.S.C. 1516 (a) and (c).

During the discovery phase of this litigation, defendant moved for a protective order seeking, among other things, to prohibit plaintiffs from conducting discovery into matters beyond the Commission's notice of investigation and hearing and the Commission's negative injury determination and statement of reasons. The defendant's motion was decided by this court on June 27, 1978, culminating in an order which, in pertinent part, reads (80 Cust. Ct. 252, 253–54, C.R.D. 78–5 (1978)):[4]

> 2. That the Secretary of the U.S. International Trade Commission, Kenneth R. Mason, shall prepare and transmit to Joseph E. Lombardi, Clerk of the U.S. Customs Court, on or before July 28, 1978, the following: (1) A certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921–141; (2) certified copies of all written submissions, questionnaires, reports and all other documents relating to investigation AA1921–141; and (3) all other things in the files of the Commission relating to the investigation. *Cf.* Judge Maletz' order in *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978), and also his unpublished order in the same case entered on May 8, 1978. See also my order in *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 80 Cust. Ct. 256, C.R.D. 78–7 (1978), entered concurrently herewith.

[4] This order was modified by protective order entered on Aug. 1, 1978, and was further modified in an order entered on Dec. 29, 1978, wherein the claim of privilege was sustained as to 3 documents.

3. That denial of defendant's present motion for a protective order shall be without prejudice to renewal respecting any documents or things that were received by the Commission on a confidential basis or are otherwise privileged.

4. That the basis of this order is to enable the court to determine whether or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law. See, e.g., *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct. 19, C.D. 4708, 435 F. Supp. 389 (1977); *Cf. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). See also questions and answers attached to the letter of Daniel Minchew, Chairman, U.S. Interntional Trade Commission, November 16, 1977, reproduced in *Hearing before the Subcommittee on Trade, House Committee on Ways and Means, on the Adequacy and the Administration of the Antidumping Act of 1921* (95th Cong., 1st sess., 1977) pp. 65–66.

Pursuant to the foregoing order, as modified, the Secretary of the Commission transmitted what are represented to be all of the documents and things enumerated and described above that were locatable, with the exception of the three documents that were claimed by the Commission Chairman to be privileged.[5] Defendant, however, again advances the argument that this court's review is limited to the Commission's statement of reasons. But defendant's pos ion respecting the scope of review has been consistently rejected by a long and uninterrupted line of authorities. See *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978); *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 80 Cust. Ct. 252, C.R.D. 78–5 (1978); *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 80 Cust. Ct. 256, C.R.D. 78–7 (1978); *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 81 Cust. Ct. 159, C.R.D. 78–13 (1978), and authorities cited therein. See also *Michelin Tire Corporation* v. *United States*, 82 Cust. Ct. 308. C.R.D. 79–6, 469 F. Supp. 270 (1979), *application for extraordinary writs denied sub nom. United States* v. *James L. Watson, Judge, United States Customs Court; Michelin Tire Corporation, Party-in-Interest*, 66 CCPA 107, C.A.D. 1230 (1979). Accordingly, I have carefully reviewed the entire administrative record transmitted to the court by the Commission, and not merely the statement of reasons.

[5] These documents and things, comprising the voluminous administrative record, are listed on two numbered indexes, which were also transmitted to the court, entitled "List No. 1—Public Documents Transmitted to the U.S. Customs Court," and "List No. 2—Confidential Documents Transmitted to the U.S. Customs Court." Public documents are identified on list No. 1, while those documents which the Commission treated as containing confidential business information and which are subject to the terms of the stipulation for protective order are identified on list No. 2.

OPINION

I

Our appellate court has repeatedly stressed the broad discretionary authority vested in the Commission to determine the existence or likelihood of injury by reason of LTFV imports and the limited standard of judicial review applicable to the Commission's determinations. *City Lumber Co. et al.* v. *United States*, 59 CCPA 89, C.A.D. 1045, 457 F. 2d 991 (1972); *Imbert Imports, Inc., et al.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973), and cases cited therein.

In *City Lumber*, the Court of Customs and Patent Appeals articulated the standard of judicial review applicable to the Commission's injury determinations under the Antidumping Act as follows (59 CCPA at 92):

> As the appellate term opinion observes, under the Antidumping Act Congress delegated to the Commission a broad discretionary power to determine whether an industry is being, or is likely to be, injured by the sale of imports at less than fair value. The courts have a very limited power of review over the Commission's determinations. It is not the judicial function to review or to weigh the evidence before the Commission or to question the correctness of findings drawn therefrom. *Kleberg & Co. (Inc.)* v. *United States*, 21 CCPA 110, T.D. 46446 (1933); compare *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940). As stated in *Kleberg*, our review of determinations of injury or likelihood of injury in antidumping cases does not extend beyond determining whether the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law. As indicated in the *Bush* opinion, "No question of law is raised when the exercise of * * * discretion is challenged."

Continuing, the appellate court went on to observe (59 CCPA at 95):

> * * * We deem appellants' admission to show that there was *substantial evidence to support the Commission's determination*, which eliminates one of their arguments for its invalidity. Moreover, the substance of this argument, in our view, is that appellants would have us weigh the evidence before the Commission. We need cite no authority for the proposition that we cannot do that because in their brief below appellants admit that "the court may neither substitute its judgment in factual matters for that of the Tariff Commission in an injury determination under the Antidumping Act, nor may it weigh the evidence before the Commission * * *." The Commission is under no obligation either to disclose all of the evidence in its possession nor to state in meticulous detail exactly on what basis it applies that evidence in determining injury or likelihood thereof. This point is, therefore, without merit. [Italic added.]

The standard of review enunciated in *City Lumber* was quoted and reaffirmed in *Imbert Imports, supra*. There, the appellate court further stated (60 CCPA at 127):

> * * * In short, we find that the *findings of the Commission are supported by substantial evidence*, and that the factors pointed out in the Chairman's dissent are not of sufficient moment to establish that the decision of the majority was *arbitrary*.
>
> Accordingly, we are satisfied that *the Commission here acted within its delegated authority and correctly interpreted and applied the law*. In fact, we think, as did the appellate term, that the determination would pass the *test as not being arbitrary, an abuse of discretion, or contrary to law*, even if the more extensive scope of review under the Administrative Procedure Act (the provisions now 5 U.S.C. 706) were appropriate, as appellant contends. As it is, we make no express holding with regard to the applicability of that act. [Italic added.]

Recently, in *Pasco Terminals, Inc.* v. *United States*, 83 Cust. Ct. 65, C.D. 4823, 477 F. Supp. 201 (1979), the court addressed the discretionary authority of the Commission in injury determinations under the Antidumping Act and the applicable standard of judicial review. On that aspect of the case, the court made the following pertinent observations (83 Cust. Ct. at 87):

> It is therefore apparent from its determination that the Commission properly employed criteria which are relevant to the determination as to whether "injury" or "likelihood of injury" in fact existed. *The relative weight it gave to those criteria was a matter of discretion and expert judgment.*
>
> In sum, the determination and statements of reasons covered all the relevant points and showed a rational and defensible basis for the affirmative determination. Accordingly, the determination must be upheld. For it is basic that having been delegated discretionary authority by the Congress, the Commission's determination may not be disturbed by the court when, as here, it had a rational basis in fact and was not contrary to law. See, e.g., *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Suwannee Steamship Co.* v. *United States*, 79 Cust. Ct. 19, 23–24, C.D. 4708, 435 F. Supp. 389 (1977). *And since the Commission has been delegated discretionary authority, it is not the function of the court to weigh the evidence considered by the Commission, determine the credibility of the witnesses appearing at the hearing, and substitute its judgment for that of the Commission;* indeed, the Commission decision, if rational and not contrary to law, must be upheld by the court *even though that decision is not one the court would have reached had the question first arisen in judicial proceedings*. See, e.g., *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, 127, C.A.D. 1094, 475 F. 2d 1189 (1973); *City Lumber Co.* v. *United States*, 64 Cust. Ct. 826, 832, 834, A.R.D. 269, 311 F. Supp. 340 (1970), *aff'd*, 59 CCPA 89, *supra*. [Italic added.]

Again, in *ASG Industries, Inc., et al.* v. *United States*, 82 Cust. Ct. 101, C.D. 4794, 467 F. Supp. 1200 (1979) (*appeal pending*), Judge Maletz in a scholarly opinion considered *in extenso* the scope of review in countervailing duty cases, and alluded to the Commission's finding of injury under the Antidumping Act (82 Cust. Ct. at 146):

> Defendant also relies on *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978), where this court held that the scope of review of an International Trade Commission's finding of injury under the Antidumping Act was, among other things, arbitrary or capricious, an abuse of discretion, or otherwise contrary to law. *But there again, a determination of whether or not there was injury under the law is committed by Congress to the sound discretion of the Commission.* Furthermore, under the Commission's practice, an administrative record is made, hearings are held, cross-examination of witnesses is permitted and specific and detailed findings are made. [Italic added.]

And in the wide-ranging Trade Agreements Act of 1979 (Public Law No. 96–39, 93 Stat. 144, enacted July 26, 1979), Congress added a new section 516A to the Tariff Act of 1930 wherein the scope and standards of judicial review in antidumping and countervailing duty cases are specifically addressed. The new section 516A, of course, is not applicable in the present case. Significantly, however, in the Senate Finance Committee's report (S. Rept. No. 96–249, 96th Cong., 1st sess. at 251 (1979)) accompanying the bill that was enacted (H.R. 4537), Congress stated its understanding of the existing standard of review applicable to determinations of the Commission:

> *Scope and standard of review.*—Section 516A clearly defines the scope and standard of review in suits challenging antidumping and countervailing determinations and orders. *Currently, the state of the law in this area is unclear and conflicting.*
>
> Subsection (b) of new section 516A sets forth the standard of review for those antidumping and countervailing duty determinations which will now be reviewable. *Under present law, determinations made by the International Trade Commission have been set aside only where found to be arbitrary or contrary to law.* * * * [Italic added.]

See also *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281, 285–86 (1974), *reh. denied*, 420 U.S. 956 (1975); *Citizens to Preserve Overton Park, Inc., et al.* v. *Volpe, Secretary of Transportation, et al.*, 401 U.S. 402, 416 (1971); Metzger & Musrey, "Judicial Review of Tariff Commission Actions and Proceedings," 56 Cornell L. Rev. 285, 320–30 (January 1971).

II

Congressional intent to provide a wide latitude within which the Commission may determine the existence or nonexistence of injury under the Antidumping Act is manifest from the absence in the statute

of any legislative roadmap or compass respecting the indicia of injury.[6] Absent such congressional guidance, the Commission has itself employed a number of reasonable indicia of injury in its investigations. Among these indicia are the following: (1) Price depression of the impacted competitive products; (2) price suppression—e.g., although domestic production costs have increased, competition from LTFV imports precludes price increases; (3) market penetration by the LTFV imports; (4) documented lost sales of domestic manufacturers to the LTFV imports; (5) operation of domestic production facilities at less than normal capacity; (6) plant closures and unemployment; (7) foreign capacity to produce for export; (8) lost profits.

"Indicia used by the Commission to determine whether, in the absence of actual injury, an industry 'is likely to be injured' within the meaning of the Antidumping Act, 1921, include increasing LTFV imports and the capacity of the foreign exporters to continue to export in the same or larger volumes so that injury is imminent and not conjectural." See the questions and answers attached to the letter of Daniel Minchew, chairman, U.S. International Trade Commission, November 16, 1977, reproduced in *Hearing before the Subcommittee on Trade, House Committee on Ways and Means, on the Adequacy and the Administration of the Antidumping Act of 1921* (95th Cong., 1st sess. at 62 (1977)). See also the separate Statement of Reasons of Commissioner Stern in *Certain Steel Wire Nails From Canada*, investigation No. AA1921–189, 44 F.R. 7840 at 7842 (1979).

It is apparent from the above-enumerated indicia that an injury determination in an antidumping case is multifaceted, and involves analysis of complex economic and financial data having an unique interrelationship in each particular case. From the Commission's statement of reasons in the present case, it appears that the Commission considered and carefully analyzed a number of pertinent economic and financial factors, including trends and levels of domestic industry shipments, exports, profits, prices, unfilled orders, and other relevant factors. Thus, in its statement of reasons, the Commission found (39 F.R. 38133):

First: The domestic and Japanese tools are different in that "[t]he domestic industry produces primarily forged tools, while the Japanese

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[6] Moreover, the broad investigatory discretion of the Commission in injury determinations was made clear by Congress in providing that the Commission could make its injury determination "after such investigation as it deems necessary." 19 U.S.C. 160(a) (1970). At the time of the investigation in this case, there was no requirement for any type of hearing, although hearings were in fact held on Aug. 20-23, 1974. The 1974 amendments to the Antidumping Act required for the first time that the Commission must hold a hearing when requested by the foreign manufacturer, the domestic importer, or any domestic manufacturer, producer, or wholesaler of the merchandise. 19 U.S.C. 160(d)(1) (1976). Hence, prior to the 1974 amendments, the Commission held hearings such as those in the present case, although it was not required to do so by the statute. Moreover, the Commission need not base its injury determination upon the record made at the hearing. *Pasco Terminals, Inc. v. United States*, 83 Cust., Ct. 65, C.D. 4823, 477 F. Supp. 201 (1979).

articles sold at less than fair value have been mostly cast or partly forged and cast."

Second: The markets in the United States for the domestic tools and the Japanese tools are different. On this aspect, the Commission found that:

> Hand tools, including the types found by the Treasury to have been sold at less than fair value, are sold in the United States in several differentiated markets—a market for higher priced, professional-quality tools of the types considered here serviced primarily by hardware stores; one for mid-priced, medium-quality tools serviced predominantly by department stores; and one for low-priced, low-quality tools serviced mostly by discount outlets, drug stores, and supermarkets. The bulk of the domestic tools (probably more than 75 percent) are sold in the market for professional tools, and most of the remainder in the market for medium-quality tools. In contrast, the Japanese tools sold at less than fair value are sold chiefly in the market for low-priced tools.
>
> Sales of tools in department stores, drug stores, supermarkets, and discount outlets are a relatively recent development, in contrast with the more traditional hardware store outlet. Sales in the newer outlets comprise the fastest growing segment of the market. Several importers are credited with the development of this market through such innovative marketing devices as racking a full line of tools in blistered cards, which at the time of its introduction was untried by domestic handtool producers. The imported tools so marketed were generally of a lower quality and price than the traditional professional tools.

Third: "[d]omestic shipments of the tools involved increased consistently, being about 39 percent greater in 1973 than in 1971."

Fourth: "[e]xports of such tools by domestic producers increased from $28 million in 1971, to $37 million in 1973, and further to $27 million in the first half of 1974 (when they equalled imports)."

Fifth: During the period of investigation, demand for domestic products increased which "was reflected in higher unfilled orders, which rose from an approximate 3 to 4 months backlog at yearend 1971 to 5 to 6 months at yearend 1973."

Sixth: The Commission found no evidence of either price depression or price suppression of the domestic tools, and that the prices of the domestic tools rose at the same rate as other handtool prices.

Seventh: The average profitability of the domestic handtool industry was maintained during the period of the investigation (1971–73). Whatever reduced operating margins may have been experienced by the domestic industry was found to be caused primarily by increased raw material costs in a period of national price controls, and in one instance by a prolonged strike. The Commission could find no evidence of causality between the LTFV sales of the involved Japanese handtools and any decreased profit margins.

Eighth: Respecting the likelihood of injury, the Commission concluded:

> The evidence before the Commission indicates not only that the domestic industry has not been injured, but that there is no likelihood of injury within the terms of the antidumping statute. Domestic shipments of handtools were higher in the first half of 1974 than in the corresponding period of 1973, responding to increased domestic consumption. The prices of both the domestically produced and Japanese handtools involved have continued to rise, but the prices of the Japanese articles have increased more steeply than those of the domestic. The steeper price increase for the Japanese articles appears to have resulted mostly from rapidly rising Japanese costs, as well as the changes in the dollar-yen exchange rate.

That the Commission proceeded on a correct legal theory is evident from the following excerpt from the statement of reasons:

> The Antidumping Act, 1921, as amended, requires that the Tariff Commission find two conditions satisfied before an affirmative determination can be made. First, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. Second, such injury or likelihood of injury or prevention of establishment of an industry must be "by reason of" the importation into the United States of the class or kind of foreign merchandise which the Secretary of the Treasury has determined is being, or is likely to be, sold at less than fair value (LTFV). [Footnote omitted.]

The separate statement of reasons for the negative determination of Commissioner Leonard explicitly details the lack of injury to the domestic industry, and therefore I have set out his reasons at length (39 F.R. 38134):

* * * * * * *

DIFFERENT MARKETS

> The specified handtools from Japan sold, or likely to be sold, at LTFV generally are manufactured by different processes and are designed for a specific market that is not fully serviced by the bulk of the domestic tools. The Japanese and domestic tools, in many cases, are not alike. The specified handtool imports from Japan have been largely concentrated in the "do-it-yourself" household market which has not been supplied traditionally by U.S. producers. These tools are of lower quality and are relatively inexpensive. Over 90 percent of the specified handtools imported from Japan are distributed to the household market. This household market is serviced by retail outlets such as discount stores, supermarkets, and drug stores for sale to the occasional user or impulse buyer whose trade or profession does not involve the regular use of handtools. This market is generally characterized by its demand for lower priced handtools.

Domestic manufacturers traditionally have produced the specified handtools of high quality for professional use. The traditional markets for the bulk of the domestically produced specified handtools are independent distributors who sell to hardware stores and to department stores catering to tradesmen such as machinists, carpenters, plumbers, and general repairmen. In 1973, for example, over 75 percent of total domestic shipments were sold for such trade or professional use.

Moreover, domestic producers have alleged that they cannot manufacture profitably the lower quality, relatively inexpensive tools sold in the household market because of prevailing U.S. labor and materials costs. Distributors of the higher quality handtools generally buy comparatively small quantities of tools of Japanese origin and then only to supplement domestic product lines or for the purpose of providing tools for immediate delivery when domestic hand tools are in short supply. [Footnote omitted.]

Commissioner Leonard then commented (*id.*):

NO INJURY

Strong market demand for the specified handtools *of all qualities* is illustrated by the increase in apparent domestic consumption over the period 1970–73. In dollar terms, overall domestic consumption of the tools covered by this investigation were *66 percent larger in 1973* than in 1970. Consumption of *wrenches increased 76 percent; pliers, 26 percent; screwdrivers, 64 percent; and metal-cutting snips and shears, 58 percent.* Domestic shipments of the specified handtools rose because of increased demand. Domestic shipments of *wrenches increased 66 percent; pliers, 31 percent; screwdrivers, 66 percent; and metal-cutting snips and shears, 52 percent.* Thus, the increase over the period 1970–73 of domestic shipments of the specified handtools was similar to the increase in total consumption. Imports took a slightly larger share of consumption during this time, and whatever increase imports were able to register in their share of the market seems to have been due to the inability of the domestic producers to satisfy the increased demand.

Unfilled domestic orders for each type of tool increased in 1972 and, with the exception of screwdrivers, again in 1973. Inventories of domestic producers began to decline in 1973 as compared with 1972. The combined effect of increased shipments, increased backlogs of unfilled orders reported to the Commission by producers (confirming the claims of distributors), declining inventories and temporary shortages of component materials during 1973–74 resulted in lengthened delivery times for the specified domestic handtools and contributed to the demand for imported tools.

During the 1970–73 period, *U.S. exports of all these tools increased by about 44 percent.* Exports exceeded imports in 1970 and 1971 and again during the first 6 months of 1974. *Due to the increase in demand for the specified handtools, domestic producers have enlarged existing production facilities, undertaken new plant construction, and registered increases in man-hours of production-related workers for the years 1972 and 1973.*

> There has been no price depression, as prices of the specified domestic handtools generally rose between 1971 and 1974. Similarly, there appears to be no evidence of price suppression. Prices for all industrial commodities advanced 7.9 percent from 1971 through 1973, with price advances for all handtools averaging 8.7 percent. In such a situation, it is difficult to conceive of any price suppression.
>
> The lack of injury to the domestic industry is also reflected in its financial experience. As a share of net sales, *net operating profits of the domestic manufacturers* where the specified handtools were produced *averaged 11.8 percent in 1971, 12.9 percent in 1972,* and *11.8 percent in 1973.* Although profits in 1973 failed to increase with increased sales, rising material costs and price control regulation were at least in part responsible for the reduction. For the period 1971–73, the operating profit ratios for the domestic manufacturers of the specified handtools were equal to or better than other U.S industries. [Italic added.]

Continuing, Commissioner Leonard made the following observations concerning the likelihood of injury (*id.*):

> NO LIKELIHOOD OF INJURY
>
> For there to be likelihood of injury, there must be a realistic connection between a situation that presently exists and what will probably happen should the present situation continue. A trend that indicates future injury must be shown. Given the evidence developed in this investigation, such a connection, such a trend, cannot be made. It would be a flight of fancy to forecast injury to the domestic industry in the future based upon the information at hand.
>
> Demand for the specified handtools as measured by apparent domestic consumption continued to increase in the first half of 1974 as compared with the first half of 1973, and so did domestic shipments. Prices of both the specified domestic and Japanese handtools have continued to increase. The two currency revaluations affecting the relationship between the dollar and the yen and rapidly rising Japanese costs by the end of 1973 had substantially reduced price differentials between the specified domestic and Japanese handtools wherever they competed. During the 12-month period June 1973–June 1974, Japanese prices generally rose at a steeper rate than did U.S. prices for the specified handtools.

In summary, an analysis of the statements of reasons in the present case shows that the Commission considered reasonable criteria in determining whether injury, or the likelihood thereof, existed. The short of the matter is that the Commission found no harm to American industry by reason of the LTFV imports. As the Commission's statement of reasons indicates, American industry prospered during the period of the LTFV imports, viz, there were healthy trends in the industry's domestic shipments, exports, and average profitability. Moreover, the Commission found no price depression or suppression in the domestic industry. Whatever factors contributed to the

reduced operating margins of some domestic producers were found to be purely domestic in origin; i.e., primarily increased raw material costs during a period of price controls, and a strike—*but not LTFV sales*. As further evidence of no injury, the prices for tools of the domestic industry and for all handtools rose at the same rate. Particularly significant is the fact that during the period of the Commission's investigation the domestic industry experienced great difficulty in filling all its orders. Plainly, an industry which is unable to meet rising demand, while at the same time shipping more merchandise, both domestically and for export, is not an industry being injured by imports. To the contrary, the Commission's findings amply demonstrate that the domestic industry was healthy, robust, and noninjured. The Commission's determination that there was no likelihood of injury is equally well founded. On that score, the Commission pointed to the continuing trend of increased domestic shipments, and it further noted that prices for the Japanese tools in question were rising at rates "more steeply than those of the domestic" (39 F.R. 38133).

III

Plaintiffs maintain that the Commission should have found from the record transmitted to the court that the LTFV pricing afforded a competitive advantage to the subject Japanese tools resulting in significant levels of market penetration of the imports accompanied by serious market disruption in the form of lost sales, preclusion from major domestic markets, restraints on investment in productive capacity, price suppression, decreased profit margins, and slowdowns in domestic shipments and production. Further, plaintiffs argue that the Commission's findings in support of its negative determination have no rational basis in fact, are arbitrary, capricious and not supported by substantial evidence. Plaintiffs are particularly critical of the Commission's findings concerning the character of the U.S. market for the tools in question and the respective natures of the domestically produced tools and the imports sold at LTFV. These findings are relevant to the competitiveness of the LTFV imports with the domestically produced handtools. On this aspect, plaintiffs urge that had the Commission found that the LTFV imports competed directly with the domestic handtools, it would have been obligated to find injury as a matter of law.

I agree with the party-in-interest's contention that plaintiffs' arguments relating to the administrative record are directed, essentially, at discretionary findings by the Commission. As conceded by plaintiffs, it is not the function of the court in reviewing an injury determination of the Commission under the Antidumping Act to weigh the evidence or substitute its judgment for that of the Commission.

City Lumber Co., supra, 59 CCPA at 92; *Imbert Imports, supra*, 60 CCPA at 126. Moreover, since the Commission based its determination on a consideration of appropriate indicia of injury, absent any clear error of judgment (and I find none), the Commission's determination cannot be regarded as arbitrary and capricious. *Bowman Transportation, Inc., supra*, 419 U.S. at 285–86; *Citizens to Preserve Overton Park, Inc., supra*, 401 U.S. at 416.

With reference to the limitation on the court's power to review the evidence before the Commission, the party-in-interest has called attention to *Deutsch* v. *United States Atomic Energy Commission*, 401 F. 2d 404, 407 (C.A.D.C. 1968), wherein the court of appeals made this relevant observation:

> We are urged to overrule the (Atomic Energy) Commission's holding that petitioner is not entitled to an award upon the ground that this conclusion is arbitrary and capricious and lacks substantial evidence in the record supporting or justifying this ruling. We were told, moreover, on oral argument that the factual basis for the Commission's holding is clearly and completely erroneous as a matter of scientific knowledge and phenomenon. The briefs and supporting documents filed by both parties are extensively devoted to presentation and argument as to the correctness, or the falsity of scientific principles related to radioactive material and products, atomic energy, irradiation, the nucleus of the atom and the action and reaction of its protons and neutrons. We are therefore confronted at the very threshold of this case with the ever-recurring question of the scope and extent of our authority to set aside the ruling of an administrative agency. Despite our daily diet of challenges to administrative agency action and our resulting repeated efforts to articulate the limits of judicial review of such actions we nevertheless are continually called upon to substitute our judgment on factual issues for that of the agency charged by Congress with the initial responsibility of making, evaluating, and acting upon those facts. *It is well settled that the factfinding function is within the exclusive province of the administrative agency.* We appear unable to establish a substantial recognition at the Bar that "*[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.*" *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, at 146, 59 S. Ct. 754, at 765, 83 L. Ed. 1147 (1939). [Italic added; footnote omitted.]

In light of the above-cited decisions, it would be impermissible for me to substitute my judgment for that of the Commission or to reweigh the evidence as to specific factual findings. After a careful and searching review of the administrative record, I hold: That the factual findings of the Commission have a rational basis in fact; that the Commission applied the proper legal standards; and that the Commission considered appropriate economic and financial factors in making its negative determination. Accordingly, the Commission's determination is not arbitrary or capricious, as claimed by plaintiffs.

IV

We now reach plaintiffs' contention that the Commission's injury determination is not supported by substantial evidence. As we have seen, the substantial evidence standard of review has been adverted to by the courts in reviewing the Commission's findings and determination under the Antidumping Act. See *City Lumber, supra*, 59 CCPA at 95; *Imbert Imports, supra*, 60 CCPA at 127; *Pasco Terminals, Inc., supra*, 83 Cust. Ct. at 65.

Consolo v. *Federal Maritime Commission et al.*, 383 U.S. 607 (1966) is a leading case defining "substantial evidence." There, the Supreme Court observed (at 619–20):

> * * * We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. "(I)t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This is something less than the weight of the evidence, and *the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F. 2d 18, 21. [Italic added; footnote omitted.]

See also *Richardson, Secretary of Health, Education, and Welfare* v. *Perales*, 402 U.S. 389, 401 (1971).

Applying the above-quoted definition to the record herein, I find that there is substantial evidence supporting the Commission's negative determination.[7] The fact that plaintiffs might be able to cite evidence in the record supporting conclusions inconsistent with those reached by the Commission does not mean that the Commission's determination is not supported by substantial evidence. Indeed, as pointed out in *Pasco Terminals, Inc., supra*, even if the Commission's determination were not one that the court would have reached had the question first arisen in judicial proceedings, the Commission's determination must be upheld if rational and not contrary to law. It is emphasized that in deciding whether the Commission's determination meets the substantial evidence test, the court does not look solely at the transcript of the public hearing and the public documents received by the Commission. The record before the Commission (and now before the court) comprises a number of confidential documents, the content of which may not now be divulged or discussed in this opinion. Nevertheless, both defendant and the party-in-interest have submitted an "accounting" of the evidence in the record supporting each of the factual

[7] This is not to imply that the Commission's determination must meet the "substantial evidence" test.

findings of the Commission, and it suffices to state that I find the Commission's determination is clearly supported by substantial evidence.

V

As a further basis for overturning the Commission's determination in this case, plaintiffs urge that the Commission disregarded its own "precedents." Defendant and the party-in-interest, however, dispute that there is any inconsistency between the Commission's determination in the present case and its determinations in prior investigations. Moreover, defendant and the party-in-interest contend that the Commission's injury investigations are *sui generis*, and therefore injury must be decided by the Commission on a case by case basis. I agree.

Simply because a particular fact involved in a prior case is involved in the present investigation does not mean that the determination in the prior case is binding on the Commission in the present investigation. Plainly, in view of the unique combination and interaction of many economic variables presented in injury investigations, determinations in prior cases are of very limited guidance in future cases. This concept was well articulated by former Deputy Assistant Secretary of the Treasury James Pomeroy Hendrick in his article, "The U.S. Antidumping Act," 58 American Journal of International Law, 914, 924 (1964):

> * * * The Tariff Commission, unlike American courts of law, is not bound by its own precedents. Even if it were, one must recognize that it is seldom that two cases are found which are truly alike. The elements may be similar, but often enough there can be subtle differences, apprehended only after careful study of the entire record, which justify an injury decision in one and a no-injury decision in the other case. * * * Most cases have more than one element present, so that the decisions can very well depend upon a combination of elements rather than any single one at any time here mentioned.

Similarly, Assistant Secretary of the Treasury Kendall, testifying before the House Ways and Means Committee in 1957, expressed much the same thought when he stated:

> To try to define "injury" is very much like trying to define precisely some of the phrases of the common law or of equity where the court's tradition may and should come to its judgment by weighing all of the factors in balance; and in any one case the balance may be very different from that of another. Injury to a large corporation or to the owner of a chain of stores may be very different from injury to the corner grocer. Injury to one industry may be very different from injury to another. Under the same set of facts mathematically opposite conclusions or differing conclusions could be drawn. These are questions of economics, not sensitive to either exact science or to predetermined close lines or channels of thought [Hearings on H.R. 6006, 6007 and 5120 at 44–45, 85th Cong., 1st sess. (1957).]

In a word, the fact that the Commission found injury in another case, bears no relevance to whether injury should have been found in the instant case, absent proof of *identity of all factors*.

Further militating against the binding effect of prior determinations by the Commission in antidumping investigations is the circumstance that prior to the Trade Act of 1974, Public Law No. 93–618, the Commission was "under no obligation either to disclose all of the evidence in its possession nor to state in meticulous detail exactly on what basis it applies that evidence in determining injury or likelihood thereof." *City Lumber Co., supra*, 59 CCPA at 95.[8] Simply put, and as previously mentioned, in antidumping investigations the Commission receives substantial amounts of confidential and sensitive information that cannot be disclosed to the general public.

VI

Finally, plaintiffs have devoted an extensive portion of their memorandum to the subject of the quantum of injury required to make an affirmative injury determination. On this point, the proposition urged by plaintiffs is that the injury test was not intended by Congress to be a rigorous one, and "more than *de minimis*" injury is sufficient for a finding of dumping. Respecting the quantum of injury required for purposes of the Antidumping Act, the Senate Finance Committee commented in connection with the Trade Act of 1974 (S. Rept. No. 93–1298, 93d Cong., 2d sess. at 180 (1974)):

> * * * Under the Antidumping Act, the Commission determines whether a domestic industry "is being or is likely to be injured, or is prevented from being established, by reason of the importation of" the less-than-fair-value imports. The term "injury," which is unqualified by adjectives such as "material" or "serious," has been consistently interpreted by the Commission as being that degree of injury which the law will recognize and take into account. Obviously, the law will not recognize trifling, immaterial, insignificant, or inconsequential injury. Immaterial injury connotes spiritual injury, which may exist inside of persons not industries. Injury must be a harm which is more than frivolous, inconsequential, insignificant, or immaterial.
>
> Moreover, the law does not contemplate that injury from less-than-fair-value imports be weighed against other factors which may be contributing to injury to an industry. The words "by reason of" express a causation link but do not mean that dumped imports must be a (or the) principal cause, a (or the) major cause, or a (or the) substantial cause of injury caused by all factors contributing to overall injury to an industry.

[8] In the Trade Act of 1974, Congress provided that the Commission, upon making its determination, "shall publish in the Federal Register such determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefore, on all the material issues of fact or law presented (consistent with confidential treatment granted by the * * * Commission, * * * in the course of making its determination)." See 19 U.S.C. 160(d) (2) (1976).

The foregoing Senate Finance Committee report makes it evident that Congress intended the term "injury" under the Antidumping Act to be construed as something "more than *de minimis*" injury. However, I can perceive of no quantum issue in this case, inasmuch as the Commission's negative determination was not based upon a finding of *de minimis* injury. In point of fact, the Commission found no injury whatsoever. Consequently, I see nothing in plaintiffs' "more than *de minimis*" construction of the term "injury" that militates against the Commission's negative determination in the present case.

CONCLUSION

For the foregoing reasons: Plaintiffs' motion for summary judgment is denied; defendant's and party-in-interest's cross-motions for summary judgment are granted; and the action is dismissed.

(C.D. 4839)

MAJESTIC ELECTRONICS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Wigs and Other Products of Human Hair

Consolidated Court No. R66/12103

Merchandise consisting of wigs and other products of human hair, imported from Italy between 1964 and 1967, was appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended. Plaintiff's claim that the correct dutiable values were the invoice unit values, as entered, and not the appraised values, overruled.

BURDEN OF PROOF

It is well established that plaintiff, in challenging the appraised values, must (1) overcome the presumption of correctness attaching to the appraised values and (2) establish the correct value by proper evidence. 28 U.S.C. 2635(a); *Andy Mohan, Inc.* v. *United States*, 396 F. Supp. 1280, 74 Cust. Ct. 105 (1975), *aff'd*, 537 F. 2d 516, 63 CCPA 104 (1976); *C. S. Emery & Co.* v. *United States*, 73 Cust. Ct. 84, C.D. 4557 (1974).

SAME—FAILURE OF PROOF

Where the plaintiff importer rebuts the presumption of correctness attaching to the appraised values, but fails to establish the correctness of the claimed values, the appeals for reappraisement are dismissed with the appraised values remaining in effect. *Millmaster International, Inc.* v. *United States*, 427 F. 2d 811, 57 CCPA 108, *modified on other grounds*, 429 F. 2d 985, 57 CCPA 114 (1970).

EXPORT VALUE—SUCH OR SIMILAR MERCHANDISE

Where wigs and other products of human hair were made to importer's specifications and differed from all other wigs and prod-

ucts of human hair in mix of hair types, length, and weight of hair, quality of materials, whether machine made, handmade or hand finished, they were not such as or similar to other such merchandise of the manufacturer.

EXPORT VALUE—SELECTED PURCHASER

Plaintiff cannot be considered a selected purchaser where there is no showing that sales of merchandise were restricted to plaintiff and no offers were made for sale to all purchasers at wholesale. *Aceto Chemical Co.* v. *United States*, 51 CCPA 121, C.A.D. 846 (1964).

EXPORT VALUE—FREELY OFFERED FOR SALE

Where plaintiff is not a selected purchaser, determination of the price of merchandise by arm's length negotiation between exporter and purchaser does not establish that the merchandise was freely offered for sale to all purchasers at wholesale for exportation to the United States at such prices.

[Judgment for defendant.]

(Decided January 30, 1980)

Stein, Shostak, Shostak & O'Hara, Inc. (*John N. Politis* at the trial; *Theo B. Audett* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Customs Litigation Branch (*Velta A. Melnbrencis* at the trial and on the briefs), for the defendant.

RE, Chief Judge: In this case, consisting of 27 appeals for reappraisement, the question presented pertains to the correct dutiable value of certain wigs and other products of human hair imported from Italy between 1964 and 1967. The merchandise was manufactured by Italwig S.A.S. of Rome, Italy (Italwig), and was purchased by the plaintiff, Majestic Electronics, Inc. (Majestic), which later changed its name to Brentwood Industries.

Based on the price of "such or similar" merchandise, it was appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a(b)), at unit values higher than the invoice unit values, as entered.

Plaintiff agrees that export value as defined in section 402(b) of the Tariff Act of 1930, as amended, is the correct basis of appraisement, but contends that the invoice unit values, as entered, represent the correct export value. Plaintiff urges, alternatively, that, if it is determined to be a selected purchaser within the meaning of section 402(f), Tariff Act of 1930, as amended, the invoice unit values represent the prices which fairly reflect the market value of the merchandise.

The question presented, therefore, is whether plaintiff has succeeded in establishing that the invoice unit values, as entered, are the correct export values for the imported merchandise. After careful considera-

tion of the testimony of plaintiff's witnesses and the entire record, it is the determination of the court that plaintiff has failed to bear its burden of proof, and these appeals for reappraisement are therefore dismissed.

At the trial, Mr. Herman Krissman, vice president of Majestic during the period in question, testified as to the facts which pertain to the purchase of the imported merchandise. As vice president of Majestic, Mr. Krissman visited Italy regularly to purchase wigs and other products of human hair. Although he visited approximately 10 manufacturers in Italy between 1964 and 1967, and purchased from 4 companies other than Italwig, the great majority of his purchases were from Italwig. With the exception of the first purchase in December 1964,[1] none of the merchandise purchased from Italwig was from existing stock but, rather, had to be made to Majestic's specifications. Majestic's first purchase, which was from Italwig's existing stock, was made to provide Italwig with additional working capital.

The price for all purchases by Majestic from Italwig was determined by arm's length negotiation based on the cost of production plus profit. The cost varied and depended upon the quality of the materials used, and whether the article was hand tied or machine made. Hand-tied wigs of Italian hair were the most expensive articles, and machine-made wigs of Oriental hair were the least expensive.

Mr. Giovanni Borghese, general manager of Italwig, negotiated the prices of the merchandise at issue with Mr. Krissman. Mr. Borghese, an Italian citizen who testified in English, described the negotiation process and the manufacturing process. Mr. Borghese corroborated Mr. Krissman's testimony that prices were determined by arm's length bargaining, and that they represented their respective companies in these negotiations. The price for all the merchandise purchased by Majestic, including the first order, was negotiated by the parties. Mr. Borghese testified that he negotiated the price for most sales for exportation to the United States. The degree or amount of negotiation, however, depended on the size of the orders.

Although the defendant introduced an Italwig pricelist, dated June 1, 1966, as defendant's exhibit A, Mr. Borghese stated that he did not have formal printed pricelists. He explained that the pricelists were only for whatever merchandise Italwig had in its showroom at the time. He stated that although some small orders were at list prices, the pricelist was used as a beginning point for the negotiation process. Although the pricelist would change to reflect the models Italwig had in its showroom, it never contained a list of models Italwig would manufacture at stated prices.

[1] Entry No. 107666 in court No. R66/15376. At trial, and in its post-trial briefs, plaintiff mistakenly referred to this entry as entry No. 710666. In plaintiff's reply brief, it is correctly identified as entry No. 107666.

Mr. Borghese explained that prices would vary depending on the quality of materials and the construction of the specific article. According to Mr. Borghese, the qualities of hair varied, and there was a great difference in price among the various types of hair. The price of a wig would also depend upon the color desired since the lighter colors required more processing, and hence were more expensive.

Mr. Borghese also stated that there was a great difference in price between hand-tied and machine-made hair products. The price not only reflected the quality of the product, but also the amount of labor required to complete it. As an illustration, Mr. Krissman testified that although it would take 16 hours or more for one worker to produce a single hand-tied wig, at least 10 wigs could be machine made by one worker in a single day.

The merchandise in issue, purchased by Majestic from Italwig, consists of various models of products of human hair, including wigs, a fall, and a wiglet. Mr. Borghese corroborated Mr. Krissman's testimony that, with the exception of Majestic's first order, all articles were specially produced to Majestic's specifications.

Mr. Borghese testified that there were considerable differences between the merchandise Italwig manufactured for Majestic, and that which it manufactured for other customers for export to the United States. The testimony is conflicting as to what merchandise the witness considered "similar" to the merchandise sold to Majestic. On cross-examination, he stated that the articles sold to Majestic were "similar" to items on an Italwig pricelist. He stated that he understood "similar" merchandise to be of the same specifications as to hair quality, color, and construction. He made it clear, however, that although he considered products with the same specifications to be "similar", there was a "very considerable difference" as to the actual product. As an example, Mr. Borghese stated that although the wiglet model sold to Majestic was similar in specifications to one sold to another customer, it was "an entirely different article." The wiglet for Majestic would not be acceptable to Italwig's other customers, and the model for other customers would not be acceptable to Majestic. Mr. Borghese stated that wigs with the same specifications could be "similar" although they would have entirely different values depending on the processing. Mr. Borghese did not testify as to the similarity of merchandise based on the statutory definition of similar merchandise contained in section 402(f) of the Tariff Act of 1930, as amended.

Mr. Borghese also testified that Italwig's prices were generally determined by negotiation on the basis of cost of production. Small orders were generally made at list prices. He stated that the order would have to be beyond a certain quantity before he would nego-

330-630 O - 81 - 4

tiate. Although there was no strict rule as to volume determining price, he admitted that prices were lower for volume purchasers.

Except for a small number of missing invoices, which Mr. Borghese could not account for, defendant introduced a complete record of Italwig's sales for the years 1964 to 1967.

Defendant called no witnesses at trial, but introduced two exhibits. Defendant's exhibit A is an Italwig pricelist dated June 1, 1966, and numbered 3, which contains none of the model names of the merchandise in issue. Defendant's exhibit B is a copy of Bureau of Customs foreign agent's report 3–158, dated August 25, 1965. In the report, Customs Representative James A. Amoroso described his visit to the offices of Italwig in Rome, Italy, and his interview with Mr. Borghese on August 20, 1965. Among other things, Mr. Borghese stated that the relationship between Majestic and Italwig was buyer and seller, and that sales were made outright. Mr. Borghese estimated that approximately 75 percent of Italwig's production was sold to Majestic, and that all sales were made on the basis of bargaining. As one of the exhibits to the report, Mr. Amoroso attached a copy of an Italwig pricelist dated August 2, 1965, which differed from defendant's exhibit A. This list contained prices of three of the models of wigs bought by Majestic. Next to the list price, Mr. Borghese wrote the price that Majestic paid for the merchandise.[2]

Plaintiff contends that, under the statutory definition of export value, it has established that the invoice unit values, as entered, are the proper dutiable values. In the alternative, plaintiff contends that if it is found to be a selected purchaser, then the invoice unit values, as entered, fairly reflect the market value of such merchandise.

Export value is defined in section 402(b), Tariff Act of 1930, as amended, as follows:

> (b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

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[2] Defendant's exhibits A and B were admissible into evidence under the terms of 28 U.S.C. 2635(b) which provides:

"(b) Where the value of merchandise is in issue:

(1) Reports or depositions of consuls, Customs officers, and other officers of the United States and depositions and affidavits of other persons whose attendance cannot reasonably be had, may be admitted in evidence when served upon the opposing party in accordance with the rules of the court.

(2) Pricelists and catalogs may be admitted in evidence when duly authenticated, relevant, and material."

Section 402 also defines terms used in the statutory definition of export value. The pertinent definitions, found in section 402(f), Tariff Act of 1930, as amended, are as follows:

> (f) DEFINITIONS.—For the purposes of this section—
>
> (1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—
>
> (A) to all purchasers at wholesale, or
>
> (B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,
>
> without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.
>
> * * * * * * *
>
> (4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value * * * can be satisfactorily determined:
>
> (A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.
>
> (B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.
>
> (C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.
>
> (D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.
>
> (5) The term "usual wholesale quantities," in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

The statutory presumption of correctness attaching to the appraiser's finding of value requires the plaintiff to establish, by competent satisfactory evidence, that the appraised values were erroneous.

(28 U.S.C. 2633 (1964), superseded by 28 U.S.C. 2635(a) (1976).) It is also incumbent upon plaintiff to establish that such or similar merchandise was freely sold or, in the absence of sales, offered for sale to all purchasers at wholesale in the principal markets of Italy in the usual wholesale quantities and in the ordinary course of trade for exportation to the United States at the alleged invoice unit values, as entered. *C. S. Emery & Co.* v. *United States*, 73 Cust. Ct. 84, 88, C.D. 4557 (1974). See also *Andy Mohan, Inc.* v. *United States*, 396 F. Supp. 1280, 1282, 74 Cust. Ct. 105, 107, *aff'd*, 537 F. 2d 516, 63 CCPA 104 (1976).

The first aspect of plaintiff's burden of proof requires that plaintiff overcome the presumption of correctness which attaches to the appraiser's findings of value.

Majestic's first order with Italwig included Italwigs, 100 percent Italian hair, handmade wigs, from Italwig's stock. This item appeared on the Italwig pricelist, defendant's exhibit A, at $60 to $90 depending on color, for quantities of 25 to 100, $54 to $81 for quantities of over 100 to 500, and $49.25 to $64.25 for quantities over 500. This item was sold to other customers of Italwig at list prices. It is clear that Customs properly appraised this first order, entered as entry No. 107666.

Majestic's subsequent orders of Italwigs were not 100 percent Italian hair, as in the first order, but were of a mixture of Italian and other human hair to Majestic's specifications. Mr. Borghese testified that the Italwigs made to Majestic's specifications were not the same as any other product Italwig manufactured. He also testified that Majestic's Italwig differed greatly from other wigs Italwig manufactured. Only the Italwig of the first sale appeared on Italwig's pricelist. The appraiser, therefore, was incorrect in appraising the Italwigs of mixed hair of the later sales on the basis of the Italwig of the first sale.

Sales of "B/Italwigs" (Brentwood Italwigs), hand tied of 100 percent human hair, were made by Italwig to customers other than Majestic although they were made to Majestic's specifications. Italwig's invoices for 1965 reveal that there were four shipments of this model to Todd Imports of Portland, Oreg. It is unclear, however, whether each of these shipments constitutes a single order or separate orders. Mr. Borghese's testimony does not reveal, and there is no way of determining, whether a specific invoice represented an order or a shipment. Plaintiff argues that these sales were small sales, and that the B/Italwig, hand tied of 100 percent human hair, was sold in significant quantities only to Majestic. If, by this argument plaintiff contends that the sales to Todd Imports were not in usual wholesale quantities, it has failed to demonstrate what are the usual wholesale quantities.

The sales to Todd Imports were at the prices listed on Italwig's pricelist attached as an exhibit to the Bureau of Customs foreign agent's report, defendant's exhibit B. This was the price which the appraiser found to be the value of the B/Italwig imported by Majestic in the present case.[3] In light of the sales of the B/Italwig to Todd Imports at the list price, and in light of the pricelist itself, plaintiff has failed to overcome the presumption of correctness attaching to the appraiser's finding of value of the B/Italwig, hand tied of 100 percent human hair.

Majestic also purchased from Italwig a B/Italwig, machine made, 100 percent human hair. This item was also on the pricelist attached to the Bureau of Customs foreign agent's report. Italwig's invoices, as introduced by plaintiff, reveal only one sale of this item to a purchaser other than Majestic. There was a sale of one machine-made B/Italwig to Todd Imports. Whether or not that sale can be considered to be in the usual wholesale quantity, inclusion of the machine-made B/Italwig on the pricelist supports the appraiser's finding of value. The plaintiff has also failed to overcome the presumption of correctness attaching to the appraiser's finding of value as to the B/Italwig, machine made of 100 percent human hair.

In addition to the sales to Todd Imports of the B/Italwig, hand tied and machine made of 100 percent human hair, sales also were made of the Italwig, hand tied of 100 percent Italian hair, to customers other than Majestic based on the pricelist attached to exhibit B. In the absence of sales, the pricelist establishes, therefore, the freely offered price for the specified merchandise.

Majestic also purchased an item that appeared on the invoices merely as Christina 500. The testimony is not clear whether this item is a wig or a fall. When asked what is a Christina 500 machine made, Mr. Krissman inquired whether the invoice said machine-made wig. When informed that it listed the item as just Christina 500, the witness determined that it was a fall. Mr. Borghese, on the other hand, testified on direct examination that he thought the Christina 500 was a wig. He was unable to determine this from the name itself, and had to rely on the price listed on the invoice to determine whether it was a wig or a fall. Since plaintiff's witnesses cannot agree on the nature of the merchandise, plaintiff has failed to rebut the presumptively correct finding of value of the appraiser as to the Christina 500.

The remainder of the imported merchandise in this action does not appear on any Italwig pricelist. Defendant's responses to plaintiff's first interrogatories reveal that these articles were valued on the basis

[3] B/Italwigs (Brentwood Italwigs), handmade, were also included in entry No. 107666 covering Italwigs which were 100 percent Italian hair. The B/Italwigs, as well as various products invoiced to Majestic and other purchasers as 100 percent human hair, did not consist of 100 percent Italian hair.

of being "such" as articles that appeared on Italwig's pricelists, or "such" as articles not appearing on an Italwig pricelist, but sold to customers other than Majestic.

Defendant's responses to plaintiff's first interrogatories show that the Roman wig sold to Majestic by Italwig, a hand-tied wig of Oriental hair, was appraised on the basis of being "such" as the B/Italwig hand-tied wig sold to Majestic and the Katy wig sold to Edith Imre Hair Fashions, Inc. of New York. Except that all three wigs were hand tied of rather long hair, the wigs were not the same. According to the uncontradicted testimony of plaintiff's witnesses, the wigs differed not only in length, but also in weight and in hair type. Since the Roman wig differed considerably from the B/Italwig and the Katy wig, this item was incorrectly appraised by Customs.

An item appearing on the invoices as Wiglet C was sold to Edith Imre Hair Fashions, Inc., and to Sallee Imports, Inc. of Oakland, Calif., at prices higher than those paid by Majestic. Mr. Borghese's testimony revealed differences among the wiglets sold to these three purchasers. Edith Imre Hair Fashions, Inc., required the front rows of hair to be hand knotted, and the wiglet came in a four-color box with a comb and bow. Although Sallee Imports, Inc., did not require the front rows to be hand knotted, the wiglet came in fancy packaging with a scarf. This wiglet also had about two more ounces of hair than Majestic's wiglet. In contrast, the Wiglet C purchased by Majestic had no hand knotting, and came in a plain poly bag without any accessories. Mr. Borghese pointed out that, because Majestic accepted the wiglet without accessories and fancy packaging, the Wiglet C cost Majestic less. Therefore, it was incorrect for the appraiser to value the Wiglet C sold to Majestic as "such" as the Wiglet C sold either to Edith Imre Hair Fashions, Inc., or to Sallee Imports, Inc.

Defendant's responses to plaintiff's first interrogatories reveal that the Monica fall and the Gioia wig were appraised on the basis of such merchandise. Defendant, however, was unable to provide information for sales of merchandise such as the Gioia wig and Monica fall. Mr. Borghese testified without contradiction that these two items were sold exclusively to Majestic, and were not similar to any other article sold by Italwig. Italwig sold an item known as Monica to Edith Imre Hair Fashions, Inc., but that item was a wig and not a fall. The Gioia was a shorty wig made from the combings left over from the manufacture of other wigs and falls. As defendant introduced no evidence of sales or offers for sale of merchandise such as the Monica fall and the Gioia wig, plaintiff's evidence overcomes the presumption of correctness attaching to the appraiser's finding of value.

In summary, plaintiff has failed to overcome the presumption of correctness attaching to the appraiser's findings of value as to the

first order of Italwigs, and as to all orders of the B/Italwig hand tied, the B/Italwig machine made, and the Christina 500. The appraiser's findings of value as to these items of merchandise are, therefore, affirmed.

The plaintiff has overcome the presumption of correctness attaching to the appraiser's findings of value as to the Roman wig, the Wiglet C, the Monica fall, the Gioia wig, and all the Italwigs expect those in entry No. 107666. In rebutting the presumption of correctness as to these items of merchandise, plaintiff has met only part of its dual burden of proof. To prevail upon its contention that the invoice unit values, as entered, represent the proper dutiable value, plaintiff must establish that such or similar merchandise was freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States at the invoice unit values, as entered. *Andy Mohan, Inc.* v. *United States*, 396 F. Supp. 1280, 74 Cust. Ct. 105 (1975), *aff'd*, 537 F. 2d 516, 63 CCPA 104 (1976); *Millmaster International Inc.* v. *United States*, 427 F. 2d 811, 57 CCPA 108, *modified on other grounds*, 429 F. 2d 985, 57 CCPA 114 (1970).

The record contains no evidence that during the period in question such or similar merchandise was actually sold or offered for sale at the invoice unit values, as entered.

Mr. Borghese's testimony indicates that Italwig did not sell merchandise that was "such or similar" to any customer other than Majestic, "except in small quantities, and in areas different than the California area." The sales to other customers referred to the B/Italwig sold to Todd Imports of Portland, Oreg. On this testimony, plaintiff's claim is based on *offers* for sale since none of the merchandise remaining in issue (Roman wig, Wiglet C as sold to Majestic, Monica fall, Gioia wig, and the remaining Italwigs) was sold to customers other than Majestic. In the absence of sales, section 402(b) requires that export value be determined on the basis of the price at which such merchandise is freely offered for sale. See *Aceto Chemical Co.* v. *United States*, 51 CCPA 121, C.A.D. 846 (1964); *United States* v. *Thomas P. Gonzalez Corp.*, 66 Cust. Ct. 597, A.R.D. 283 (1971); *Louis Goldey Co.* v. *United States*, 55 Cust. Ct. 759, A.R.D. 196 (1965).

The record in the case at bar does not support plaintiff's alternative claim with respect to the selected purchaser provision within the meaning of section 402(f)(1)(B) of the Tariff Act of 1930, as amended. Both Mr. Krissman and Mr. Borghese testified that there was no agreement between Majestic and Italwig whereby Italwig would sell only to Majestic in the United States. Mr. Borghese stated that he did

not like selling the same merchandise that he sold to Majestic to other customers in California. This was Mr. Borghese's personal choice, however, for as conceded, Italwig was not tied to Majestic by a contract of exclusivity. Selected purchasers at wholesale are those designated and selected by the seller as purchasers to whom the seller restricts its sales to the exclusion of all other purchasers at wholesale. *Aceto Chemical Co.* v. *United States*, 51 CCPA at 127; *Picker Corp.* v. *United States*, 68 Cust. Ct. 276, 283, R.D. 11768 (1972), *aff'd*, 75 Cust. Ct. 171, A.R.D. 323 (1975); *H. M. Young Associates, Inc.* v. *United States*, 60 Cust. Ct. 842, 850, R.D. 11517 (1968).

Since Italwig did not restrict the sales of its merchandise to Majestic, Majestic is not a selected purchaser. Consequently, export value may not be predicated solely on the basis of the price paid for the imported merchandise. *Mitsubishi International Corp.* v. *United States*, 72 Cust. Ct. 34, C.D. 4501 (1974); *Agricolas de Mexico, S. de R.L. de C.V.* v. *United States*, 66 Cust. Ct. 612, A.R.D. 285 (1971). In this case, therefore, there must be evidence that the claimed prices, as represented by the invoice unit values, were the prices at which the merchandise was freely offered to all purchasers at wholesale during the period in question.

The record contains no proof whatsoever of offers of such or similar merchandise to other purchasers at wholesale. Hence, plaintiff's claim that export value of the imported merchandise is represented by the invoice unit values, as entered, must fail.

There are several means by which the freely offered price can be established. Ordinarily, a freely offered price can be established by a manufacturer's pricelist that is freely circulated in the trade. *Judson Sheldon International Corp.* v. *United States*, 51 Cust. Ct. 374, R.D. 10586 (1963), *aff'd*, 54 Cust. Ct. 773, A.R.D. 183 (1965); *Sanford Steel Pipe Products Co.* v. *United States*, 383 F. Supp. 837, 73 Cust. Ct. 155 (1974). The only pricelists introduced into evidence in this action were introduced by defendant. Those pricelists do not include the merchandise still in issue. Mr. Borghese testified that the pricelist was only the departure point for negotiations between the customer and Italwig which usually determined the price. Only in the case of "small volume" purchasers were sales at list price. Additionally, a pricelist was maintained only for those articles that were displayed in Italwig's showroom, which did not represent the full line of products Italwig was capable of manufacturing, and had manufactured in the past.

In the absence of pricelists, other means were available to plaintiff to prove the freely offered price. Some examples include prices contained in catalogs, letters, telegrams, records of price negotiation, and

other communications between Italwig and potential customers. *Sanford Steel Pipe Products Co.* v. *United States*, 383 F. Supp. 837, 73 Cust. Ct. 155 (1974). Plaintiff presented no such evidence to the court. Its evidence was restricted to demonstrating that Majestic freely negotiated prices in arm's length negotiations with Italwig, representing the actual cost of manufacture, plus an amount to cover Italian taxes and manufacturer's profit.

Plaintiff contends that "(i)t is a long established principle that *bona fide* arm's length transactions between unrelated parties are sufficient to establish export value," and relies on *Ernest Lowenstein, Inc.* v. *United States*, 425 F. Supp. 856, 78 Cust. Ct. 169 (1977), *aff'd*, 451 F. Supp. 988, 80 Cust. Ct. 211 (1978) and *J. L. Wood* v. *United States*, 505 F. 2d 1400, 62 CCPA 25 (1974).

Plaintiff's reliance on these cases is misplaced. Both the *Lowenstein* and *Wood* cases dealt with the establishment of export value in the case of a *selected purchaser*. They refer to the means of proving a price that "fairly reflects market value," which establishes the export value element of "freely sold or, in the absence of sales, offered for sale." The language of these cases, that export value may be established by prices negotiated in *bona fide* arm's length negotiations that establish a price fairly reflecting market value, is not applicable in the present action since Majestic is not a selected purchaser.

Recognizing that the *Lowenstein* and *Wood* cases dealt with selected purchasers, plaintiff submits that "there can be no valid reason for applying a more restrictive rule to the transactions in the case at bar." The reason, of course, is to be found in the specific provisions of the applicable statute. In other cases in which the plaintiff is not a "selected purchaser," the "freely sold or offered for sale" element is met by demonstrating that the merchandise is sold or offered for sale to *all purchasers at wholesale*. Section 402(f)(1). Indeed, section 402(f)(1) defines "freely sold or, in the absence of sales, offered for sale" in terms of sales or offers "(A) to all purchasers at wholesale, *or* (B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise." [Italic added.] The statute expressly establishes *separate and different* standards in the case of selected purchasers, or all other wholesale purchasers. Proof of a price "which fairly reflects the market value of the merchandise" does not establish the price at which the merchandise is sold or offered to "all purchasers at wholesale."

Plaintiff's evidence, designed to show that the price to Majestic was determined by *bona fide* arm's length negotiation, may establish a price "which fairly reflects the market value of the merchandise," but it does not establish a price at which the merchandise is freely offered to

all purchasers at wholesale. Citing *Superior Merchandise Co.* v. *United States*, 54 Cust. Ct. 781, A.R.D. 185 (1965), plaintiff asserts that the fact the price is determined through negotiation does not negate its use in finding export value, provided it otherwise meets the statutory requirements. The determinative words, however, are "provided it otherwise meets the statutory requirements" of export value. In the *Superior Merchandise Co.* case, glass bead necklets produced from "irregular" glass beads were offered at 19½ cents per dozen, plus packing. This offer was rejected since the cost, plus packing, would exceed 20 cents per dozen, the level at which the duty would almost double. The importer indicated that it would be interested if the price were below 20 cents per dozen, packed. Sales were made to the importer and others after the offering price was reduced to 18¼ cents per dozen, plus packing, or 19½ cents per dozen, packed, either price being below 20 cents per dozen. The court, in the *Superior Merchandise Co.* case, held that "[i]t may be that these offers arose originally out of negotiations and bargaining by Superior and (manufacturer), but if, as we find, offers at the same price were made generally to persons interested in buying the merchandise, this price was 'freely offered.'" 54 Cust. Ct. at 787.

In the present case, plaintiff presented no evidence of offers of "such or similar" merchandise to all purchasers at wholesale for exportation to the United States during the period in question. The negotiated price, represented in the invoice unit values, as entered, which plaintiff alleges to be the export value, does not "otherwise meet the statutory requirements of export value" as required by the *Superior Merchandise Co.* case.

Although plaintiff successfully rebutted the presumption of correctness attaching to the appraiser's findings of value as to the Italwigs, except for the first order, Roman wigs, Wiglet C, Monica falls, and the Gioia wigs, it failed to establish that the invoice unit values, as entered, represent the proper dutiable values as claimed. As to these items of merchandise, therefore, plaintiff's appeals for reappraisement are dismissed. Since plaintiff has failed to establish its claimed values, the appraised values remain in effect. *Millmaster International Inc.* v. *United States*, 427 F. 2d 811, 813–14, 57 CCPA 108, 110–11, *modified on other grounds*, 429 F. 2d 985, 57 CCPA 114 (1970).

In summary, the findings of value by the appraiser as to the first order of Italwigs, all orders of B/Italwigs, hand tied and machine made, and the Christina 500 are affirmed. As to the remaining merchandise, the Italwigs after the first order, the Roman wigs, the Wiglet C, the Monica falls, and the Gioia wigs, the appeals for reappraisement are dismissed with the appraised values remaining in effect. Judgment will be entered accordingly.

(C.D. 4840)

STATE METALS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 76–6–01378

[Plaintiff's motion granted.]

(Dated February 5, 1980)

Shaw & Stedina for the plaintiff.
Alice Daniel, Assistant Attorney General, for the defendant.

ORDER

RE, C.J.: Upon reading and filing of plaintiff's motion, with the consent of the United States, defendant, to dismiss this action, which action was the subject of a decision and judgment of this court, decided on March 28, 1979, C.D. 4793, which decision and judgment is now the subject of a pending motion for rehearing filed by defendant on April 25, 1979, and in consideration of the fact that plaintiff and defendant have reached agreement as to an acceptable resolution of the issue contested in this action, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff's motion to dismiss is granted, and court No. 76–6–01378 is therefore dismissed; and it is further

ORDERED that the decision and judgment of this court in C.D. 4793, decided March 28, 1979, now being moot, is hereby vacated and set aside, *Cf. United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950); and it is further

ORDERED that, inasmuch as the action is dismissed and the decision and judgment vacated and set aside, defendant's motion for rehearing in C.D. 4793 is moot.

(C.D. 4841)

COLONNA & CO., INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Marble and travertine blocks

Consolidated Court No. 70/50462

Imported marble and travertine blocks are not advanced beyond their rough state by additional sawing done at the quarry to straighten irregular shapes, eliminate cracks and bumps. The work is done to create a merchantable rough block, has no direct relation to the ultimate stone products, and is not a manufacturing step. The classification in provisions for manufactured stone is held erroneous. The

contrary holding in *Domestic Marble & Stone Co.* v. *United States*, 64 Cust. Ct. 360, C.D. 4003 (1970) is criticized.

[Judgment for plaintiff.]

(Decided February 6, 1980)

Lamb & Lerch (*Murray Sklaroff* at the trial and on the brief) for the plaintiff.
Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* at the trial and on the brief), for the defendant.

WATSON, Judge: This consolidated action challenges the classification of marble and travertine blocks imported from Italy. The marble block was classified as sawed marble under item 514.57[1] of the Tariff Schedules of the United States (TSUS) and assessed with duty at the rate of 40 cents per cubic foot. The travertine blocks were classified as sawed travertine under item 515.24[2] of the TSUS and assessed with duty at the rate of 14.5 or 12.5 per centum ad valorem, depending on the date of entry.

Plaintiff claims that the marble block is properly classifiable as marble, in block, rough or squared, under item 514.51[3] of the TSUS, dutiable at the rate of 22 cents per cubic foot and further claims that the travertine blocks are properly classifiable as unsawn travertine under item 515.21[4] of the TSUS, dutiable at the rate of 7 or 6 cents per cubic foot, depending on the date of entry.

The record of *Domestic Marble & Stone Co.* v. *United States*, 64 Cust. Ct. 360, C.D. 4003 (1970) was incorporated herein.

The imported stone blocks are removed from the quarry by wire sawing, resulting first in a large stone mass of 100 to 200 tons and then in more manageable rectangular blocks of less than 20 tons. A typical block would be about 10 feet long, 3½ feet high, and 3½ feet wide, and would weigh about 10 tons. At the quarry some additional work is normally done to straighten out irregular shapes, remove bumps and recut blocks to eliminate cracks. In the *Domestic Marble & Stone Co.* case, this additional work was considered to be manufacturing and the court held travertine blocks to be manufactured within the meaning of item 515.24. The defendant argues for the *stare decisis* effect of that holding.

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[1] Marble, breccia, or onyx, sawed or dressed, over 2 inches thick ..... 40¢ per cubic foot.
[2] Travertine, hewn, sawed, dressed, polished or otherwise manufactured, and suitable for use as monumental, paving, or building stone ..... 14.5% ad val. [1970]
12.5% ad val. [1971]
[3] Marble, breccia, in block, rough or squared only ..... 22¢ per cubic foot.
[4] Travertine, not hewn, not sawed, not dressed, not polished, and not otherwise manufactured ..... 7¢ per cubic foot. [1970]
6¢ per cubic foot. [1971]

However, the court is presently of the opinion that *stare decisis* should not apply because the decision in the *Domestic Marble* case was erroneous. It is unreasonable to hold that massive blocks of stone, which must be utterly transformed after importation into relatively thin slabs, are subjected to manufacture by steps taken at the quarry which merely place the blocks in a rough, merchantable condition and eliminate the need to ship useless, cracked portions and protuberances. The additional shaping of the rough blocks has no direct relation to the dimensions of the finished product. In this important respect the analogies drawn in the *Domestic Marble* case to the cutting of one end of used print rollers and the trimming of palmyra stalks to approximate ordered lengths were defective. In *David M. Studner* v. *United States*, 62 Cust. Ct. 63, C.D. 3679, 295 F. Supp. 289 (1969), the cutting of one end of used print rollers was directly related to the ultimate use of the objects as articles of interior decoration such as lamp bases, umbrella stands, floor vases, etc. In *Chas. H. Demarest, Inc.* v. *United States*, 44 CCPA 133, C.A.D. 650 (1957), the palmyra stalks were trimmed to approximate ordered lengths, an act which directly contributed to the ensuing production of brooms and brushes. No equivalent trimming to size took place here and there was no measurable relation between what was done at the quarry and the final products.

A far better analogy is offered by cane sticks which were stripped of bark, trimmed of valueless portions, dried or seasoned, denoded (removal of joints between the straight sections), sorted, and, in some instances, quartered—all this prior to importation for use in the manufacture of reeds for musical instruments. Nevertheless they were held to be "in the rough." *Rico Products Co. et al.* v. *United States*, 44 Cust. Ct. 100, C.D. 2159 (1960). *Cf. General Freight Services, Inc., et al.* v. *United States*, 74 Cust. Ct. 87, C.D. 4590 (1975) in which frozen "pearl" onions, from which the roots, tops, and outer skin layers were removed, were held not to be cut, sliced, or otherwise reduced in size. *See also The Hothouse Products Corp. et al.*, 21 CCPA 261, T.D. 46789) (1933) in which endive, from which the grower normally removed 20 percent of the outer leaves, was held to be a vegetable in its natural state. *See also E. Dillingham, Inc., et al.* v. *United States*, 61 Cust. Ct. 33, C.D. 3522 (1968) in which the removal of burrs or slivers of steel from axe head forgings was held not to have advanced them beyond forgings.

If there was any doubt in the incorporated record as to the significance of the additional work done at the quarry, the additional testimony herein made it clear that the imported blocks do not possess perfectly straight surfaces and the surface portions of the blocks are rarely, if ever, used. After importation they are normally sliced away as part of the process by which a rank of gang saws makes parallel cuts

to produce slabs from the interior of the block. In retrospect, the rudimentary additional shaping which occurred at the quarry had no direct relation to the final product and was only an eminently reasonable preparation of a bulky natural material for shipment and sale.

It is clear that the sawing done merely to remove stone from the quarry and reduce it to commercial sizes suitable for transportation is not the manufacturing of travertine referred to in item 515.24. The sawing referred to in that provision must be an act of manufacture, not an act of extraction from the earth or a related preparation for shipment and sale. Nor would it be reasonable to read item 514.57 covering sawed marble as including marble in which sawing has been used only for the same basic quarrying purposes and for the preparation of blocks for shipment, because another provision (item 514.51) already exists for blocks of marble in the rough.

Accordingly, it is the holding of the court that the classification of these marble and travertine blocks in the provisions governing those materials when "sawed" was incorrect. Plaintiff has successfully proved that the proper classification for the marble block is under item 514.51 as marble blocks in the rough and that the proper classification for the travertine blocks is as unmanufactured travertine under item 515.21.

Judgment will enter accordingly.

(C.D. 4842)

TERRA FIRMA SALES CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 75-10-02593

ARTIFICIAL FLOWERS

Flowers made by glueing together parts of natural plants were properly classified as artificial flowers. The use of natural plant materials to create a flower does not result in a natural flower. An artificial flower is a flower whose body was not created by nature.

[Plaintiff's motion denied; defendant's cross-motion granted.]

(Dated February 6, 1980)

Stanley R. Gustafson for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* on the briefs), for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: This action challenges the classification of imported articles having the likeness of flowers. They consist of parts of dried plants which have been glued together to form a flower and then attached to a wrapped wire stem. They were classified as artificial flowers under item 748.21 [1] of the Tariff Schedules of the United States (TSUS) and assessed with duty at the rate of 42.5 per centum ad valorem. Plaintiff claims that they are either free of duty as dried or bleached natural plants under item 748.30 [2] of the TSUS or dutiable at the rate of 5 per centum ad valorem under item 748.25 [3] of the TSUS as cut natural flowers.

Plaintiff argues in effect that artificial flowers must be composed of artificial substances. However, in the opinion of the court, the artificiality of artificial flowers resides in the manner of their creation and not in the synthetic nature of their components. An artificial flower is a flower whose body was not created by nature, and it matters not whether it is made from bits and pieces of natural plants. This court has previously held that the insertion of an artificial stem into a natural flower does not create an artificial flower. *Hub Floral Corp.* v. *United States*, 77 Cust. Ct. 21, C.D. 4669, 422 F. Supp. 283 (1976). However, in that case the essential part of the natural flower remained inviolate. Here, there are no complete flowers of natural origin but rather objects which arose from artificial construction.

There is no ambiguity in the term artificial flowers and no reason to refer to legislative history. In any event, plaintiff's references [4] reveal only that the fabrication of artificial flowers from parts of natural plants was not one of the principle concerns of the legislators. There is no indication that such products were not to be considered artificial.

For the above reasons, the correctness of the classification is apparent and it is clear that plaintiff's motion for summary judgment must be denied at the same time as defendant's cross-motion must be granted. It is therefore

ORDERED, that plaintiff's motion for summary judgment be, and hereby is, denied, and it is further

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[1] Artificial flowers, trees, foliage, fruits, vegetables, grasses, or grains, parts of the foregoing, and articles made of the foregoing (except articles provided for in item 748.15 or 748.40 of this subpart):

* * * * * * *

Other ..... 42.5% ad val.

[2] Grains, grasses, lichens, mosses, and other natural plants, all the foregoing, and parts thereof, dried, bleached, colored, or chemically treated, suitable for bouquets, wreaths, or other ornamental use:

Dried or bleached ..... Free

[3] Cut natural flowers, dried, bleached, colored, or chemically treated ..... 5% ad val.

[4] "Summaries of Tariff Information" (1948), vol. 15, part 2, pp. 76, 79; "Summary of Tariff Information" (1929), schedule 14, p. 1976.

ORDERED, that defendant's cross-motion for summary judgment be, and hereby is, granted, and it is further

ORDERED, ADJUDGED AND DECREED, that the liquidated assessment of duties be, and hereby is, affirmed, that plaintiff's claims be, and hereby are, overruled, and that this action be dismissed.

(C.D. 4843)

IDEAL MUSICAL MERCHANDISE CO., A DIVISION OF IDEAL INSTRUMENT CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Horse Tail Hair—Bow Hair

Court No. 75-8-02145

PROCESSING—HORSEHAIR—BOW HAIR

In a contest as to whether imported merchandise is horsehair or bow hair, the extent of the processing the merchandise has undergone is the critical factor. Where the facts adduced at trial clearly demonstrate the merchandise may be used as is, or has been significantly processed, as the facts in this case do show, the merchandise must be classified as bow hair. *United States* v. *J. Gerber & Co., Inc., et al.*, 58 CCPA 110, C.A.D. 1013, 436 F. 2d 1390 (1971); *B. Feder* v. *United States*, 58 Cust. Ct. 223, C.D. 2946 (1967).

PROCESSING—HORSEHAIR—BOW HAIR

Where imported horsehair has been double drawn, weighed, bundled, washed, sterilized, fumigated and graded, as appearing in the case here, that importation must be classified as bow hair.

[Judgment for defendant.]

(Decided February 13, 1980)

Freundlich, Schwartz & Weinraub (*Milton J. Freundlich* at the trial; *Jeffrey A. Loeb* with him on the brief) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Sidney H. Kuflik* at the trial and on the brief), for the defendant.

LANDIS, Judge: The question presented in this case is whether the imported merchandise invoiced as "double-drawn horse tail hair" [1] should be classified as "Bow hair" under Tariff Schedules of The United States (TSUS) item 726.20 or as "Other * * *" hair under TSUS item 186.55. There is a significant difference in the tariff rates for if plaintiff's claim is upheld the merchandise is properly entered free of duty.

[1] "Drawn" hair refers to that sorted precisely as to length.

Plaintiff claims the proper classification is under TSUS item 186.55, to wit:

SCHEDULE 1. – ANIMAL AND VEGETABLE PRODUCTS

* * * * * * *

PART 15. – OTHER ANIMAL AND VEGETABLE PRODUCTS

* * * * * * *

Subpart D. – Feathers, Downs, Bristles, and Hair

* * * * * * *

Hair, and fur removed from the skin, not specially provided for, crude, sorted, treated, dyed, or otherwise processed but not made up into articles:

* * * * * * *

Other

186.55	Crude, sorted, treated, or both sorted and treated, but not otherwise processed	Free

Defendant urges that the Customs Service's classification is correct. TSUS item 726.20, under schedule 7, part 3, subpart B, reads "Bow hair." Since the country of exportation is the People's Republic of China, the rates of duty prescribed by the tariff schedules, column 2, apply. General headnote 3(e), "Products of Communist Countries." Thus the ad valorem rate of duty under TSUS item 726.20 is 40 percent.

The issue in this case, simply stated, is whether the imported bulk horsehair has been sufficiently processed to be classified as violin bow hair. On the basis of the testimony adduced at trial, I uphold the defendant's contention and sustain the classification previously made by the Customs Service.

As the decision in this case is dependent on the testimony of the witnesses, the evidence given by the witnesses should be reviewed.

The testimony consisted of two witnesses for the plaintiff and one for the defendant.

Plaintiff's first witness was Mr. Jack Loeb, the president of the plaintiff corporation, Ideal Musical Merchandise Co. He testified he had been in the musical merchandise business since 1945, that he had been involved in all facets of the music industry (R. 8), and that while he has seen horsehair processed into bow hair (R. 13), he had never personally restrung a bow (R. 43). Mr. Loeb described how the horsehair is processed into bow hair, as follows:

> First of all, the hair has to be combed. The short hairs have to be removed from the bundle. It has to be washed, it has to be separated into specific measurements, and it has to be washed in order to prepare it to be used as a violin bow (R. 13).

It is undisputed that the importation in issue is bulk hair, although the plaintiff also introduced coiled hanks of violin bow hair. Mr. Loeb reiterated how the bulk hair is transformed into the hanks:

> As I stated before, this hair, when it comes in this condition, this horse tail hair, has to be separated, the short hairs have to be removed, it has to be combed, washed, and waxed. The ends have to be waxed in order to prepare it. As you notice, the wax tip on the end of the coil of the bow has been—this has been already processed for use on a violin bow, or cello bow, or viola bow, or any bow used for a stringed instrument (R. 17).

Under cross-examination, Mr. Loeb conceded that in some of the catalogs introduced by plaintiff into evidence, bulk horsehair as well as hanks was listed under the category "bow hair" (R. 53, 56). Also on cross-examination, the witness stated that the imported merchandise had not been processed at all (R. 59); yet he admitted that the merchandise was double-drawn, weighed, and bundled for purposes of sale, washed, sterilized, and fumigated (R. 59–60). Mr. Loeb stated he did not know whether the bulk hair had been graded as to color (R. 61). However, in clear contradiction to this, as defendant's counsel pointed out, in response to interrogatories this witness had previously stated the merchandise had been graded as to color. The interchange proceeded as follows:

> Q. Do you know if it has been graded as to color?
> A. No. All I know is that it has been fumigated in order to comply with U.S. Customs requirements.
> Q. I would like to show you plaintiff's response to interrogatory 5, which defendant propounded to plaintiff. The question in interrogatory 5.(a) says: "Describe fully the processing the subject merchandise underwent from the time it was removed from the horse in order to place it in its condition as imported."
> And you state: "Ans.: Unknown to plaintiff in detail except that it was (1) double drawn, (2) weighed and bundled, (3) sterilized or fumigated, and (4) graded as to color."
> A. Well, it is possible. I don't remember that, but it is possible. I know that this has been weighed and bundled because that is the way it is sold.
> JUDGE LANDIS: When the witness says "this," he is referring to plaintiff's exhibit 2 (R. 61).

Mr. Loeb also testified as to what remained to be done to the importation to transform it into bow hair:

> It has to be processed. It has to undergo additional washing, it has to undergo additional sorting, the short hairs have to be removed, the black hairs have to be removed, it has to be treated, it has to be measured, it has to be tied, and it has to be waxed, and then it becomes bow hair, ready to be used in violin bows (R. 71–72).

Plaintiff's second witness was Mr. John Sipko, an employee of the plaintiff corporation. Mr. Sipko works with all musical string instru-

ments, adjusting and repairing them (R. 88, 89), and has done so for over 40 years (R. 89). He repairs bows for professional musicians (R. 92). Mr. Sipko has rehaired many thousands of bows (R. 101).

To the question of whether the importation could be used immediately in a bow, Mr. Sipko answered: "For better bow I have to select it" (R. 90). Subsequently, he enumerated the other processes the bulk hair would have to undergo to be used as bow hair—combing four or five times, tieing, and then burning the end (R. 90–91), and possibly waxing the end (R. 92–93).

On cross-examination, Mr. Sipko explained that the hanks of hair would have to undergo the same processes as the bulk hair in order to be used as bow hair (R. 97–98). On redirect, the witness appeared to testify that the hanks of hair could be used as bow hair without much further processing—but his testimony was not that clear (R. 99). On recross, he stated that there was "not a big difference" in the processing of hanks and bow hair, but again his testimony was uncertain (R. 101–102).

The most persuasive witness was defendant's, Mr. David Renard. Mr. Renard served as head repairer of old instruments, which included responsibility for rehairing and restringing of bows for 20 to 25 years, at the firm of Luthier Rosenthal & Son (R. 104). He had been stringing bows with bow hair since he was about 9 years old. He estimated that he had rehaired some 6,000 to 8,000 bows (R. 104). Mr. Renard has strung bows for many philharmonic men and persons such as Jascha Heifetz, Mischa Elman, and John Corigliano (R. 104–105). Mr. Renard has imported bow hair similar to the importation at bar (R. 105).

Mr. Renard explained how he would string a bow with the imported merchandise (R. 105–106). Significantly, Mr. Renard testified that he would string the hanks of hair just as he would the bulk hair:

> Well, it would be the same way; without taking them off the large bulk. It is the same thing actually, except it is a smaller quantity. It still has to be done over as far as sorting them out, taking out the short hairs and dark hairs and things (R. 106).

In response to a hypothetical question, whether he would charge a higher price for using the bulk hair or hanks, assuming the same amount of hair was used from each, Mr. Renard responded that there would not be a difference in price (R. 110). He added that as far as time was concerned, one might need more time in stringing a bow from hanks than from the bulk (R. 110). I find the following interchange on direct examination also significant:

> Q. Now, if you or I were to cut hair directly from a horse and give it to you, would you be able to place that on a bow?
> A. No.
> Q. But you could use plaintiff's exhibit 2 to string a bow?
> A. Definitely (R. 110).

The most important query and response went as follows:

> Q. In your opinion, does the subject merchandise need any further processing to be considered bow hair? That is, plaintiff's exhibit 2?
>
> A. No; it is usable the way it is (R. 111).

Mr. Renard, who was the most credentialed witness, straightforwardly testified that the imported merchandise is bow hair. He stated that the coils of horsehair introduced, which both sides agree is bow hair, would be strung on a bow just as the bulk hair.

On balance, the testimony is heavily weighted in favor of the defendant's position. Of course, as defendant's brief contends, there is a presumption in favor of the Customs Service's classification.

Plaintiff's arguments are unavailing. Plaintiff has argued that the bulk hair is not sufficiently processed to be used as bow hair. Yet defendant's witness, Mr. Renard, specifically testified that the merchandise could be used as is, and plaintiff's witness, Mr. Sipko, seemed to concede the point. Only witness Loeb, who had never restrung a bow, felt that more processing was mandatory.

Plaintiff also argued that only coiled hanks of horsehair, not bulk hair, are used to restring bows. However, the very catalogs introduced by plaintiff demonstrated that bulk hair, as well as coiled hanks, may be categorized as bow hair. Indeed, defendant's witness testified that he preferred restringing with bulk hair.

Finally, plaintiff relies on *B. Feder* v. *United States*, 58 Cust. Ct. 223, C.D. 2946 (1967). In *Feder*, the proper classification of silvergrey horse tail hair was in issue. The merchandise was classified under paragraph 1541(a) of the Tariff Act of 1930, as modified by the Torquay Protocol to the General Agreement on Tariffs and Trade, T.D. 52739, as "Violin bow hair." Plaintiff urged classification under paragraph 1688 of the 1930 Tariff Act, as "Hair of horse * * * cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially provided for." The Court sustained the plaintiff's protest. However, the facts are clearly distinguishable from those at bar.

As here, both sides agreed that the importation was horsehair. The issue in *Feder* was "whether, at the time of importation, the horsehair in question had been advanced in condition sufficiently to be considered as violin bow hair as classified or whether the imported horsehair is 'Hair of horse * * * unmanufactured.' " *Feder*, 224. The testimony of record in *Feder* established that the merchandise was covered with kerosene, that approximately 40 percent of the hair consisted of off-color material, dead hair, and hair of improper lengths. In our case, the merchandise was not covered with kerosene, had been double drawn, and only about 5 percent would not be usable as bow hair (R. 111).

> Each case must be decided on the facts of record therein. In the instant case, the merchandise represented by plaintiff's ex-

> hibit 1 (the importation) is not violin bow hair in the condition as imported. The imperfections therein are many and include various colors, sizes, dirt, and kerosene. Horsehair in that condition is not usable as violin bow hair without extensive processing [58 Cust. Ct., 226–227].

As I have noted, the weight of the testimony here is precisely the reverse. *See United States* v. *J. Gerber & Co., Inc., et al.*, 58 CCPA 110, C.A.D. 1013, 436 F. 2d 1390 (1971); *B. Feder* v. *United States*, 58 Cust. Ct. 223, C.D. 2946 (1967).

Furthermore, the plaintiff has failed to carry its dual burden of proof. Plaintiff must not only show that the Customs Service's classification is erroneous, but must also demonstrate the correctness of the claimed classification. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). Plaintiff's claimed classification, TSUS item 186.55, is set out supra. The critical language is: "Hair * * * Crude, sorted, treated, or both sorted and treated, but not otherwise processed." Even plaintiff's chief witness, Mr. Jack Loeb, testified that the imported merchandise had been otherwise processed before entry (R. 60). Thus, TSUS item 186.55 would be an improper classification according to plaintiff's own witness.

Finally, plaintiff's exhibits 12–A and 12–B for identification are deemed irrelevant. They were admitted only as illustrative exhibits (R. 39, 81–82), and while this action by the court was proper, nevertheless, as defendant states in its brief:

> * * * even if these exhibits had been admitted for other than illustrative purposes they are totally immaterial and irrelevant with respect to the instant action. Whereas the instant merchandise was exported from the People's Republic of China into the United States in 1974, plaintiff's exhibits 12 A and B for identification originated from Japan and were imported into this country in 1978. The classification by the Customs Service of the imported hair is a separate and distinct action from any other entries subsequently imported * * * (defendant's brief, 27).

For all these reasons, I find for the defendant and uphold the classification of the Customs Service.

Judgment for the defendant will enter accordingly.

(C.D. 4844)

THE FERRISWHEEL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Scottish Highland Jackets and Kilts

Court No. 77–8–02280

Articles of Highland dress imported from Scotland were classified as ornamented men's wearing apparel, of wool, and of cotton.

Plaintiff claimed the articles were not ornamented because the alleged ornamentation, fringe, epaulets, and braid, was functional and traditional. The court found that the fringe, epaulets and braid were primarily decorative and rendered the garments ornamented for tariff purposes. The Scottish Highland jackets and kilts were thus properly classified by the customs officials.

ORNAMENTED WEARING APPAREL—DEFINITION

Whether a garment having fringe, epaulets or braiding is ornamented for tariff purposes depends upon whether the fringe, epaulets or braiding adorns or embellishes the garment. *Excelsior Import Associates, Inc.* v. *United States*, 444 F. Supp. 780, 79 Cust. Ct. 144 (1977), *aff'd*, 583 F. 2d 513, 66 CCPA 1 (1978); *Blairmoor Knitwear Corp. et al.* v. *United States*, 284 F. Supp. 315, 60 Cust. Ct. 388 (1968).

ORNAMENTATION—PRIMARY PURPOSE

If the primary purpose of fringe, braid or epaulets added to a garment is to adorn, embellish or enhance the appearance of the garment, it will be considered ornamented for tariff purposes, even though the additions are incidentally utilitarian. *Inter-Maritime Fwdg. Co., Inc.* v. *United States*, 69 Cust. Ct. 138, C.D. 4384 (1972); *See also Paramount Bead Corp. et al.* v. *United States*, 19 CCPA 385, T.D. 45522 (1932); *Arthur J. Fritz & Co., Inc.* v. *United States*, 52 Cust. Ct. 61, C.D. 2437 (1964).

SAMPLES—EVIDENCE

The court may look at the illustrative exhibits as potent witnesses. *Karoware, Inc.* v. *United States*, 564 F. 2d 77, 65 CCPA 1 (1977); *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C.A.D. 676 (1958).

AGENCY RULINGS—PRECEDENT

Agency rulings by the Customs Service are not binding on the Customs Court. *Dilbro Pearl Co., Inc.* v. *United States*, 515 F. 2d 1157, 62 CCPA 95 (1975); *C. J. Tower & Sons* v. *United States*, 33 Cust. Ct. 14, C.D. 1628 (1954).

[Judgment for defendant.]

(Decided February 21, 1980)

Thomas G. Ferris, pro se.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* at the trial and on the brief), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for Customs duty purposes, of articles of Highland dress imported from Scotland. The articles include two men's kilts made of wool, a Sheriffmuir jacket made from cotton, and an Argyll jacket fashioned from wool.

The wool garments were classified by the Customs officials under item 380.02 of the Tariff Schedules of the United States (TSUS),

as modified by T.D. 68–9, as ornamented men's wearing apparel, of wool. Accordingly, they were assessed with duty at the rate of 42.5 per centum ad valorem. The Sheriffmuir jacket was classified as an article of ornamented men's wearing apparel, of cotton, under TSUS item 380.00, as modified by T.D. 68–9, and was assessed with duty at the rate of 35 per centum ad valorem.

Plaintiff maintains that none of these items is ornamented. Hence, it contends that the wool garments should properly be classified under TSUS item 380.66 with a duty of 37.5 cents per pound plus 21 per centum ad valorem, and the Sheriffmuir jacket under TSUS item 380.12, as modified by T.D. 68–9, with a duty of 8 per centum ad valorem, as men's wearing apparel, not ornamented.

The pertinent statutory provisions are as follows:

Classified under:

Schedule 3, part 6, subpart F:

"Men's or boys' lace or net wearing apparel, whether or not ornamented, and other men's or boys' wearing apparel, ornamented:

380.00	Of cotton	35% ad val.
380.02	Of wool	42.5% ad val."

Claimed under:

Schedule 3, part 6, subpart F:

"Other men's or boys' wearing apparel, not ornamented:

Of cotton:

* * * * * * *

380.12	Valued over $4 each	8% ad val.

* * * * * * *

Of wool:

* * * * * * *

380.66	Valued over $4 per pound	37.5¢ per lb. + 21% ad val."

Schedule 3, headnote 3 of the Tariff Schedules of the United States provides in pertinent part:

3. For the purposes of the tariff schedules—

(a) *the term "ornamented"*, as used with reference to textile fabrics and other articles of textile materials, *means fabrics and other articles* of textile materials *which are ornamented with*—

(i) fibers, filaments (including tinsel wire and lame), yarns, or cordage, any of the foregoing introduced as needlework or otherwise, including—

(A) embroidery, and pile or tufting, whether wholly cut, partly cut, or not cut, and

(B) other types of ornamentation, but not including functional stitching or one row of straight hemstitching adjoining a hem;

(ii) burnt-out lace;

(iii) lace, netting, *braid*, *fringe*, edging, tucking, or trimming, or textile fabric;

(iv) applique and replique work, beads, bugles, spangles, bullions, or ornaments; or
(v) any combination of the foregoing types of methods of ornamentation; [Italic added in part.]

At the outset, the court finds that plaintiff has abandoned its claim as to the Argyll jacket. Plaintiff, at the trial, submitted an illustrative exhibit of the wool Argyll jacket. After the trial, however, but before briefs were submitted, plaintiff requested that the exhibit be returned for its personal, temporary use. Defendant acceded to this request on the stipulation that plaintiff return the exhibit contemporaneously with filing its brief, or, failing to do so, abandon that portion of the claim which pertained to the Argyll jacket. Plaintiff agreed to this stipulation. Nevertheless, plaintiff filed its brief without returning the exhibit. It thus abandoned its claim as to the Argyll jacket. Consequently, the Customs classification of the Argyll jacket under TSUS item 380.02 is affirmed.

As to the remaining articles, the two men's kilts and the Sheriffmuir jacket, the question presented is whether these garments are ornamented for Customs duty purposes. Based upon a careful examination of the garments, and the record before the court, it is the determination of the court that they have been properly classified by the Customs officials as "other men's or boys' wearing apparel, ornamented," of wool, and of cotton, respectively.

At the trial, plaintiff called four witnesses and introduced five exhibits, illustrative of the garments in question. The defendant did not call any witnesses, but relied upon its cross-examination of the witnesses, and the statutory presumption of correctness which attaches to the classification of the Customs officials. 28 U.S.C. 2635(a); *United States* v. *New York Merchandise Co., Inc.*, 435 F. 2d 1315, 58 CCPA 53 (1970). To overcome this presumption, the plaintiff must prove that the Customs classification was wrong and that its claimed classification is correct. *United States* v. *New York Merchandise Co., Inc., supra; Technical Tape Corp.* v. *United States*, 55 CCPA 38, C.A.D. 931 (1968).

The kilts are garments of male attire, similar to skirts, which wrap around the body at the waist and fall to the knee. They are fashioned in wool plaid known as tartan. Traditionally, different tartans distinguished Scottish family clans and militia. Because the wrap of the kilt overlaps across the front of the garment, the front is two pieces thick. The underneath piece attaches at the left hip, and the top piece, or apron, overlaps the underneath piece, and attaches at the right hip. The edge of the apron is fringed from the waist to the knee.

The Sheriffmuir jacket is made of blue cotton velvet. It is a close-fitting man's jacket, tapered to the waist, with braided epaulets, stand-up collar, and gauntlet cuffs. Pointed double flaps, two sets in the front and two in the back, hang from the waist. A pocket is con-

cealed on the under flap of each of the double sets of flaps in the front of the jacket. On the top flap of all four sets of flaps are three strips of braiding spaced about an inch and a half from one another. At the end of each strip of braid is a silver button. Braid and buttons are similarly affixed to each cuff.

Mr. Thomas G. Ferris, the owner of plaintiff import business, is an attorney. Although not admitted to practice before this court, he appeared pro se. He testified that the fringe on the kilts serves to strengthen and protect the edge of the kilt's front piece or apron from wear, and may be replaced, thereby extending the life of the kilt. He explained that centuries ago the fringe resulted from the normal fraying of the fabric. With the invention of the sewing machine and refinement of the kilt, the fringe is now added to the kilt by turning under the front edge of the apron, and sewing two separate pieces of cloth to the turned under edge. These two pieces of cloth, which extend about half an inch beyond the edge, are then raveled to produce the fringe. According to Mr. Ferris, without a fringe a kilt is not authentic, unless it is one of those kilts worn by Highland military regiments which does not have a fringe. Mr. Ferris has never seen a civilian kilt that did not have a fringe.

On cross-examination, Mr. Ferris admitted that he had never replaced a fringe on a kilt, nor had any of his customers ever asked him to replace one. He also testified that women's kilts were identical to men's kilts in all respects except size. In response to questioning he admitted that the fringe on a woman's kilt, though physically like that on a man's, was decorative rather than functional.

As to the Sheriffmuir jacket, Mr. Ferris testified that the epaulets are functional because the left one may be used to secure the plaid, and the right one to secure a sword strap. The plaid is a rectangular length of tartan, worn so that it extends from the left shoulder diagonally across the back, under the right arm and diagonally across the chest to the left shoulder where it is pinned to the epaulet with a large brooch. According to Mr. Ferris, the purpose of securing the plaid to the left epaulet, rather than to the jacket, is to prevent the jacket from being torn should the plaid inadvertently be pulled. Mr. Ferris also testified that the plaid is primarily worn on dress occasions, and that the sword strap is not usually worn, though it may be used for ceremonial purposes.

With reference to the braiding on the jacket, Mr. Ferris admitted that it serves no function but is traditional. He explained that it is intended to give the appearance of ancient style jackets by simulating buttonholes on the cuffs and pocketflaps which were once functional. He noted that in ordering Sheriffmuir jackets he specifies only the name of the jacket, the size, and the fabric number. Mr. Ferris indicated that Sheriffmuir jackets always come with braid and button

features, and if one came without them he would return it. He explained that his customers are almost exclusively members of Scottish societies, and authenticity is important to these groups. Mr. Ferris also stated that he imported similar jackets for women, and that on those jackets he considered the braiding to be ornamental.

Plaintiff's second witness was Mr. J. Charles Thompson, an expert on Scottish heraldry and tartans. He testified that he does not believe anyone can explain the origin of the fringe on the kilt, but if the side of the kilt is merely hemmed, the hem very soon may wear through. The witness said he has replaced the fringe on a kilt. Concerning the jacket, Mr. Thompson testified that the epaulets may be used to hold the bonnet when it is not being worn. This use comes from the military. He stated that the buttons and braid are also military features which originated in the latter half of the 18th century. Mr. Thompson noted that the plaid is part of formal attire, and should not be worn on all occasions when Highland dress is worn.

Plaintiff's two other witnesses were Mr. William Banks, the manager of a store owned by a Scottish company which manufactures and sells Highland dress, and Mr. William Quay, the owner of a small business which imports Scottish wearing apparel. Mr. Banks testified that women's kiltlike skirts are not traditional garments but that there is no significant difference between the fringing on the woman's garment and that on a man's, other than cost of production. He further testified that the fringing on a woman's kiltlike skirt has an ornamental effect, and that it performs no function.

Mr. Quay testified that in ordering Highland dress he specifies no special features other than color. He has never received a jacket which did not meet accepted standards. Were he to receive one without the traditional epaulets, braid, and buttons, he would send it back since it would not be authentic attire. The same would be true of the fringe on a kilt.

The specific Customs classification question presented is whether the fringe on the kilts, and the epaulets and braid on the jacket, render the kilts and the jacket ornamented under the appropriate provisions of the tariff schedules.

Plaintiff maintains that the imported garments are not ornamented because: (1) The fringe and epaulets are functional, and the braiding, though no longer functional, simulates buttonholes which were once functional; and (2) all of these features are traditional in Highland dress, and, therefore, do not constitute ornamentation.

The defendant asserts that the plaintiff has failed to overcome the presumption of correctness which attaches to the classification of the Customs officials. It indicates that whether or not braiding and fringe per se constitute ornamentation, headnote 3 of schedule 3 "establishes that braid and fringe are at least among the group of common features

which ornament garments." It maintains that the "samples themselves stand as potent witnesses for the Government and dispel any contention that the fringe, braid, and also the epaulets are not decorative embellishments which adorn the garments." The defendant adds that "the fringe, braid, and epaulets are primarily, if not exclusively, decorative."

The law which pertains to the ornamentation of imported garments has been examined in a number of decided cases. See *Excelsior Import Associates, Inc.* v. *United States*, 444 F. Supp. 780, 79 Cust. Ct. 144 (1977), *aff'd*, 583 F. 2d 513, 66 CCPA 1 (1978); *Blairmoor Knitwear Corp. et al.* v. *United States*, 284 F. Supp. 315, 60 Cust. Ct. 388 (1968); *The Baylis Brothers, Inc.* v. *United States*, 282 F. Supp. 791, 60 Cust. Ct. 336 (1968), *aff'd*, 416 F. 2d 1383, 56 CCPA 115 (1969). These cases have interpreted headnote 3 of schedule 3 which provides that for purposes of the tariff schedules—

> (a) *the term "ornamented"*, as used with reference to textile fabrics and other articles of textile materials, *means fabrics and other articles* of textile materials *which are ornamented with*—
>
> * * * * * * *
>
> (iii) lace, netting, *braid*, *fringe*, edging, tucking, or trimming, or textile fabric; [Italic added in part.]

They teach that, notwithstanding the headnote language, the addition of lace, netting, braid, or fringe, for example, would not per se render an imported garment "ornamented." Rather, the headnote "sets forth the circumstances under which fabrics and articles may be considered to be ornamented, and the types of embellishments which may accomplish that effect." *Blairmoor Knitwear Corp. et al.* v. *United States*, 284 F. Supp. 315, 318, 60 Cust. Ct. 388, 392 (1968).

In essence, in every case, the basic question is whether the additional materials or features were used primarily for the purpose of ornamentation. If the primary purpose was ornamentation, the imported article or garment has been held to be "ornamented" within the meaning of the tariff schedules. Ornamentation, as distinguished from a utilitarian purpose, implies adornment and embellishment, i.e., an enhancement in appearance and beauty.

The cases also teach that the adornment or embellishment accomplished by the addition, such as the braid or fringe in this case, must be more than incidental. However, if the primary purpose of the addition is ornamental, an incidental utilitarian purpose will not prevent the garment from being considered "ornamented" for Customs duty purposes. *Inter-Maritime Fwdg. Co., Inc.* v. *United States*, 69 Cust. Ct. 138, C.D. 4384 (1972). *See also Paramount Bead Corp. et al.* v. *United States*, 19 CCPA 385, T.D. 45522 (1932); *Arthur J. Fritz & Co., Inc.* v. *United States*, 52 Cust. Ct. 61, C.D. 2437 (1964).

In the present case, therefore, the court must determine whether the fringe, braid, and epaulets adorn or embellish the garments, and whether enhancing the beauty and appearance of the garments is their primary purpose.

It is often stated in Customs law that illustrative exhibits are potent witnesses. *Karoware, Inc.* v. *United States*, 564 F. 2d 77, 65 CCPA 1 (1977); *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C.A.D. 676 (1958). This is particularly true in a case where the issue is one of ornamentation. *The Baylis Brothers, Inc.* v. *United States*, 282 F. Supp. 791, 60 Cust. Ct. 336 (1968), *aff'd*, 416 F. 2d 1383, 56 CCPA 115 (1969).

It is clear that the fringe added to the kilts, and the epaulets and braid added to the jacket, embellish and enhance their beauty. Although this cannot be denied, plaintiff contends that these features are only incidentally ornamental, and are primarily functional. The court does not agree.

Plaintiff asserts that the fringe on the kilts is functional because it protects the garment from wear, and allows the fringe to be replaced without discarding the garment. At trial, however, only Mr. Thompson testified that he had ever replaced the fringe on a kilt. Mr. Ferris testified that he had never replaced a fringe, nor been asked to do so by any of his customers. Mr. Banks stated that the fringe performs no function. Mr. Ferris opined that the fringe serves a utilitarian function because it prevents unraveling of the apron edge of the kilt. Close examination, however, will show that, rather than the fringe, it is the stitching over the edge of the apron that prevents unraveling. Additionally, both Mr. Ferris and Mr. Banks testified that they would consider the fringe on a woman's kilt, which is like that on a man's, to be decorative and nonfunctional.

A statement of this court from *Inter-Maritime Fwdg. Co., Inc.* v. *United States*, 69 Cust. Ct. 138, C.D. 4384 (1972), is particularly applicable here. In the *Inter-Maritime Fwdg.* case the question was whether scarves imported from Scotland, having fringe along the edges, and short, protruding weft threads on the sides, were ornamented. The court wrote:

> While there is evidence in the instant case that the fringe served to prevent or slow down fraying, the testimony and the sample indicate that its primary purpose was ornamental: To enhance the appearance and aesthetic appeal of the scarf. 69 Cust. Ct. at 144.

From an examination of the kilts and all of the testimony, it is the determination of the court that the fringe is primarily ornamental and only incidentally utilitarian.

It is also the determination of the court that the epaulets and braiding on the Sheriffmuir jacket are primarily ornamental. Plaintiff

ascribes three functions to the epaulets: holding the bonnet, securing the sword strap, and securing the plaid in such a manner that, if it is inadvertently pulled, the epaulet will be torn and not the jacket. All of the evidence presented indicates conclusively that these functions are not so important to the jacket as the decorative and ornamental effect created by the epaulets. Protecting the jacket from being torn by an accidental pull on the plaid is, at best, incidental, and not the primary function of the epaulets. The witnesses testified that the epaulets were of military origin and were used to hold plaid, sword, and bonnet. Other testimony establishes clearly that plaid, sword, and bonnet are not proper attire for all occasions on which Highland dress is worn. On most occasions when the jacket is worn the epaulets perform none of these functions. From all of the evidence the court concludes that the epaulets are not functional, and are retained primarily for their ornamental and decorative value.

Plaintiff does not claim that the braiding on the flaps and cuffs of the jacket is functional. Since it is agreed that the braid serves no function, other than ornamentation, the braiding renders the jacket ornamented for tariff purposes irrespective of any alleged functions performed by the epaulets.

Plaintiff nevertheless contends that the fringe, braid, and epaulets, whether or not currently functional, are traditional features of Scottish Highland dress, and that, therefore, articles of Highland dress decorated with these additions are excluded from being classified as "ornamented" for tariff purposes. In support of this assertion, plaintiff cites agency rulings in which the Customs Service has allowed particular garments with traditional features to be classified as "not ornamented." Even if the agency rulings cited by plaintiff suggest a different result in this case, and the court is not persuaded that they do, agency rulings are not binding on this court. *Ditbro Pearl Co., Inc.* v. *United States*, 515 F. 2d 1157, 62 CCPA 95 (1975); *C. J. Tower & Sons* v. *United States*, 33 Cust. Ct. 14, C.D. 1628 (1954). Here, the Customs officials have decided that the garments under consideration do not fall within the narrow exceptions that may have been allowed. Moreover, the classifications enjoy a presumption of correctness.

Although not cited by the parties, the court has also examined Customs classification decisions which dealt with the importation of certain ornamental costumes or apparel as "regalia." *Leo J. Doyle* v. *United States*, 44 Cust. Ct. 426, Abs. 64081 (1960); *Duquesne University Tamburitzans* v. *United States*, 41 Cust. Ct. 372, Abs. 62355 (1958); *Railway Express Agency* v. *United States*, 36 Cust. Ct. 452, Abs. 59971 (1956). These cases have considered the interpretation and application of paragraph 1773 of the Tariff Act of 1930, the predecessor provision to TSUS item 851.30. These provisions pertain to the duty-free importation of "regalia" by narrowly defined religious

or other institutions. It is to be noted, however, that both under paragraph 1773 and the present provision, it is stated that the term "regalia" does not include regular wearing apparel. Moreover, plaintiff clearly does not qualify as one of the institutions enumerated under these provisions. The existence of the provisions indicates that Congress has considered the importation of traditional attire and, in some instances, has chosen to treat it specially. The present case, however, is not one of those instances.

In substance, plaintiff urges the court to hold that garments, having clearly ornamental features which may be traditional, are classifiable as "not ornamented" because the ornamentation is necessary to make the garment authentic. The court has found no statutory or decisional authority for such a holding. Traditional features, such as the fringe, braid, and epaulets, are retained when no longer functional because they enhance the aesthetic appeal and beauty of the garment. When features, whether or not traditional, are added to a garment primarily for purposes of decoration and ornamentation, the garment is "ornamented" within the meaning of the tariff schedules.

In view of the foregoing, it is the determination of the court that the kilts and the Sheriffmuir jacket were properly classified by the Customs officials as ornamented men's wearing apparel, of wool, and of cotton, respectively. The Customs classification is, therefore, sustained, and the complaint is dismissed.

Judgment will be entered accordingly.

(C.D. 4845)

SOUTHWEST FLORIDA WINTER VEGETABLE GROWERS ASSOCIATION, ET AL., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT

On Defendant's Motion to Dismiss

Court No. 80-1-00019

[Defendant's motion granted.]

(Dated February 27, 1980)

Van Ness, Feldman & Sutcliffe (*Gerry Levenberg* on the brief) for the plaintiffs.
Alice Daniel, Acting Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, on the briefs), for the defendant.

Arnold & Porter (*Alexander E. Bennett, Brooksley E. Landau*, and *Enid L. Veron* on the brief) for intervenor West Mexico Vegetable Distributors Association.

MALETZ, Judge: The question to be decided is whether in an action filed after January 1, 1980, this court has jurisdiction under the Trade

Agreements Act of 1979 (hereafter TAA) to review a preliminary determination of sales at not less than fair value that was made by the Secretary of the Treasury prior to January 1, 1980, the effective date of the TAA.

The case arises as follows: On October 19, 1979, plaintiffs, who are three nonprofit organizations composed of farmers in Florida engaged in the production of fresh winter vegetables (tomatoes, peppers, eggplant, squash, and cucumbers), filed an antidumping petition with the Secretary of the Treasury alleging that certain fresh winter vegetables from Mexico were being, or were likely to be, sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended (19 U.S.C. 160 et seq.).

In response to this petition, the Secretary of the Treasury initiated an antidumping investigation and on November 5, 1979, published a tentative determination of sales at not less than fair value in which the Secretary concluded that there were "inadequate grounds to believe or suspect that the purchase price of the fresh winter vegetables from Mexico that are the subject of this investigation is less than the fair value, and thereby the foreign market value, of such or similar merchandise." 44 F.R. 63588, 63589.

On January 3, 1980, plaintiffs filed the present action seeking (1) an order that this preliminary or tentative negative determination by the Secretary was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law; (2) an order determining that there is a reasonable basis to believe or suspect that fresh winter vegetables from Mexico are being or are likely to be sold in the United States at less than fair value; (3) an order requiring the administering authority to immediately withhold appraisement of the subject merchandise; and (4) an order remanding the case to the administering authority with a direction to immediately issue a new preliminary determination consistent with the findings of the court.

Defendant has moved to dismiss the action for lack of jurisdiction and the principal issue before the court is whether section 1002(b)(4) of the TAA permits judicial review of the challenged preliminary negative determination of the Secretary.

Section 1002(b)(4) of title X of the TAA (which title covers judicial review) reads (93 Stat. 307):

> (b) TRANSITIONAL RULES.—
>
> * * * * * * *
>
> (4) CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY DETERMINATIONS.—With respect to any preliminary determination or final determination of the Secretary of the Treasury under section 303 of the Tariff Act of 1930 or the Antidumping Act, 1921, which is treated under section 102 of this act as if made under section 703(b), 705(a), 733(b), or 735(a) of the Tariff Act

> of 1930 (as added by title I of this act) such determinations shall be subject to judicial review in the same manner and to the same extent as if made on the day before the effective date.

Before considering section 1002(b)(4) further, it is important to understand the relationship of that section with section 102 of the TAA which delineates transitional rules to govern the status of countervailing and antidumping investigations pending on the effective date of the TAA. Section 102(b)(2) is the transitional rule applicable to the status of pending antidumping investigations where the preliminary determination was made prior to January 1, 1980. It provides (93 Stat. 189):

> (b) PENDING INVESTIGATIONS OF LESS-THAN-FAIR-VALUE SALES.—If, on the effective date of title VII of the Tariff Act of 1930 (i.e., January 1, 1980), there is an investigation in progress under the Antidumping Act, 1921, as to whether imports from a country are being, or are likely to be, sold in the United States or elsewhere at less than fair value, then:
>
> * * * * * * *
>
> (2) If the Secretary has made under the Antidumping Act, 1921, a preliminary determination, but not a final determination, that imports from such country are being or are likely to be sold in the United States or elsewhere at less than fair value, the investigation shall be terminated and the matter previously under investigation shall be subject to the provisions of title VII of the Tariff Act of 1930 as if the preliminary determination under the Antidumping Act, 1921, were a preliminary determination under section 733 of that title made on the effective date of title VII of the Tariff Act of 1930 (i.e., January 1, 1980).[1]

To the extent relevant, the import of section 102(b)(2) is that "(w)ith respect to pending antidumping * * * investigations, the last determination made under the old law will be treated (by sec. 102(b)(2)) as having been made under new law and the time limits and procedures of the new law will subsequently apply." H. Rept. No. 96–317, 96th Cong., 1st Sess., 78 (1979).[2] This means that for the purpose of determining the time within which a final determination must be made by the administering authority and the procedures to be followed,

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[1] Sec. 102(b)(2) specifically applies to preliminary affirmative determinations under the Antidumping Act but does not mention preliminary negative antidumping determinations. However, the legislative history of this section indicates that it covers preliminary negative antidumping determinations as well as preliminary affirmative antidumping determinations. See S. Rept. No. 96-249, 96th Cong., 1st Sess. 102 (1979); H. Rept. No. 96-317, 96th Cong., 1st Sess. 78 (1979). It is also to be noted that the Secretary of Commerce (the successor to the Secretary of the Treasury as the administering authority under the TAA) has likewise taken the position that sec. 102 (b)(2) is applicable to preliminary negative antidumping determinations. But because of the effect of sec. 1002(b)(4), as explained below, it is unnecessary to decide this question and it is therefore assumed *arguendo* that sec. 102 (b) (2) covers such preliminary negative determinations.

[2] Similarly, the Senate Finance Committee report on the TAA states (S. Rept. No. 96-249, *supra*, at 102):

> Sec. 102 is a transition rule for cases in progress under the current * * * antidumping laws. The cases would continue but under the new laws. Sec. 102 provides counting rules for application of the new time limits depending on the stage of the investigation under current law. * * *

section 102(b)(2) treats a preliminary determination made under the Antidumping Act prior to January 1, 1980, as if it were a preliminary determination made on January 1, 1980, under section 733 of the Tariff Act of 1930 (as added by section 101 of the TAA, 93 Stat. 163). Parenthetically it is to be observed that section 735(a)(1) of the Tariff Act of 1930 (as added by sec. 101 of the TAA, 93 Stat. 169–70) requires that a final determination be made within 75 days after the issuance of a preliminary determination.[3]

On the other hand, the transitional rules of the TAA pertaining to *judicial review* of preliminary determinations made prior to January 1, 1980, are contained in section 1002(b)(4)—and not in section 102. More specifically, section 1002(b)(4) provides, as previously set forth, that judicial review of preliminary antidumping determinations made prior to January 1, 1980, "shall be subject to judicial review *in the same manner* and *to the same extent* as if made on the day before the effective date (January 1, 1980)." [Italic added.]

Against this background, plaintiffs argue that for purpose of judicial review under section 1002(b)(4) of the Secretary's preliminary negative determination which was published on November 5, 1979, the law to be applied is not the law in effect prior to January 1, 1980, but rather is section 516A(a)(1)(E) of the Tariff Act of 1930 (93 Stat. 301). This latter section was added by section 1001(a) of title X of the TAA (93 Stat. 300 et seq.) and permits judicial review of preliminary antidumping determinations made under section 733(b) of the Tariff Act of 1930 (as added by sec. 101 of the TAA, 93 Stat. 163).

According to plaintiffs, the sole effect of section 1002(b)(4) is to establish the day before the effective date of the TAA as the date from which the 30-day period for seeking judicial review pursuant to section 516A(a)(1)(E) of a preliminary determination begins to run. Plaintiffs state that since they filed this action within this timeframe (i.e., on January 3, 1980), this court has jurisdiction.

I cannot agree with plaintiffs' reading of section 1002(b)(4). For the language of that section is clear that the law to be applied for purpose of judicial review is the law in effect on the day before the effective date of the TAA. In other words, judicial review under section 1002(b)(4) is to proceed without regard to the amendments made by title X of the TAA. In this connection, the Senate Finance Committee report explained section 1002(b)(4) of the TAA as follows (S. Rept. No. 96–249, *supra*, at 256):

> * * * (T)he bill would provide in subsection 1002(b)(4) that with respect to judicial review of any preliminary * * * determination of the Secretary of the Treasury under * * * the Anti-

[3] In accordance with these new statutory requirements, a final determination in the present case must be issued by the administering authority on or before Mar. 17, 1980.

> dumping Act which, according to the provisions contained in title VII of the Tariff Act of 1930 as provided in section 102 of the bill, would be treated as if made under specified provisions of title VII, *review would proceed without regard to the amendments made by title X*. [Italic added.]

The short of the matter is that the applicable law for the purpose of judicial review is the law which was in effect prior to the effective date of the TAA without regard to the amendments made by title X of the TAA. And since section 516A(a)(1)(E) is an amendment made by title X of the TAA, it is not applicable here.

Plaintiffs further argue that if Congress intended that section 1002(b)(4) preclude judicial review of preliminary determinations existing on the effective date of the TAA, it would have included such determinations within section 1002(b)(1) of the TAA which section, plaintiffs state, lists those actions for which the amendments made by title X of the TAA (covering judicial review) do not apply. Instead, plaintiffs continue, "Congress enacted a separate subsection to cover such actions, section 1002(b)(4), which by its literal terms permits review under the amended judicial review provisions."

The argument is without merit since section 1002(b)(1) is not preemptive of *all* the cases where title X does not apply. This is demonstrated by the several provisions of section 1002(b) (93 Stat. 307 et seq.) which read as follows:

> (b) TRANSITIONAL RULES.—
>
> (1) CERTAIN PROTESTS, PETITIONS, ACTIONS, ETC.—The amendments made by this title shall not apply with respect to—
>
> (A) any protest, petition, or notice of desire to contest filed before the effective date under section 514, 516(a), or 516(d), respectively, of the Tariff Act of 1930;
>
> (B) any civil action commenced before the effective date under section 2632 of title 28 of the United States Code; or
>
> (C) any civil action commenced after the effective date under such section 2632 if the protest, petition, or notice of desire to contest (under sec. 514, 516(a), or 516(d), respectively, of the Tariff Act of 1930) on which such action is based was filed before such effective date.
>
> (2) LAW TO BE APPLIED FOR PURPOSES OF SUCH ACTIONS.—Notwithstanding the repeal of the Antidumping Act, 1921, by section 106(a) of this Act, and the amendment of section 303 of the Tariff Act of 1930 by section 103 of this Act, the law in effect on the date of any finding or determination contested in a civil action described in subparagraph (A), (B), or (C) of paragraph (1) shall be applied for purposes of that action.
>
> (3) CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS.—The amendments made by this title shall

apply with respect to the review of the assessment of, or failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

(4) CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY DETERMINATIONS.—With respect to any preliminary determination or final determination of the Secretary of the Treasury under section 303 of the Tariff Act of 1930 or the Antidumping Act, 1921, which is treated under section 102 of this Act as if made under section 703(b), 705(a), 733(b), or 735(a) of the Tariff Act of 1930 (as added by title I of this act) such determinations shall be subject to judicial review in the same manner and to the same extent as if made on the day before the effective date.

From the foregoing, it is apparent that section 1002(b) in its entirety provides, among other things, that if the underlying administrative determination sought to be judicially reviewed was made prior to the effective date of the TAA, then judicial review is to proceed in accordance with the law in effect prior to the effective date of the TAA without regard to the amendments made by title X. Thus, sections 1002(b)(1) and 1002(b)(2) make clear that the protests, petitions, and actions listed in section 1002(b)(1) are subject to judicial review in accordance with the law in effect prior to the effective date of the TAA. Similarly, section 1002(b)(3) specifies in pertinent part that if no assessment of a countervailing or antidumping duty was made prior to the effective date of the TAA, then a challenge to the underlying administrative finding would be subject to judicial review in accordance with the law in effect prior to the effective date of the TAA. Finally, section 1002(b)(4) prescribes in pertinent part that preliminary countervailing and antidumping determinations made prior to the effective date of the TAA are judicially reviewable in accordance with the law in effect prior to the effective date of the TAA.

It is thus evident from these statutory provisions that Congress did not intend to exclude only those cases listed in section 1002(b)(1) from the judicial review provisions of title X. On the contrary, it is plain from the provisions of sections 1002(b)(3) and 1002(b)(4) that countervailing and antidumping duty assessment cases and preliminary countervailing and antidumping determinations are also subject to judicial review in accordance with the law in effect prior to the

effective date of the TAA where the underlying administrative determination was made prior to the effective date of the TAA.[4]

In summary, the court holds that for purposes of judicial review in the present case, the law in effect on the day before the effective date of the TAA is applicable. That law is section 516 of the Tariff Act of 1930, as amended by the Trade Act of 1974 (19 U.S.C. 1516). But under section 516(d) of that law judicial review in this court pursuant to 28 U.S.C. 1582(b) is not available to challenge a preliminary negative antidumping determination. See, e.g., S. Rept. No. 96–249, 96th Cong., 1st Sess. 250–1 (1979). Hence, the court lacks jurisdiction of the preliminary negative determination here in issue under the law in effect on the day before the effective date of the TAA.

For the foregoing reasons, the action is hereby dismissed without prejudice.

(C.D. 4846)

NORMAN G. JENSEN, INC., A/C CALHOUN'S COLLECTORS SOCIETY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Postage Stamps

Court No. 77–1–00113

I. Congress is deemed to have used the name of an article included in the Tariff Schedules of the United States (TSUS) in the commercial sense, which, in the absence of evidence to the contrary, shares the same meaning as the common meaning thereof.

II. The common meaning of the term "postage stamps" as used in item 274.40, TSUS, is a label issued by a government or by the express authority thereof, which may be affixed to mail evidencing the prepayment of charges for the transmission thereof through its postal services.

III. The philatelic meaning of the term "postage stamps" is synonymous with the common meaning and usage of that term.

IV. The merchandise in issue, consisting of 23 carat gold strips of a dimension 1½ inches by 2 inches, bearing a design and lettering, produced and sold by private parties and when affixed to a card or letter permits the same to be transported by private carrier from

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[4] Misplaced is plaintiffs' reliance on the statement in the House Ways and Means Committee report on the TAA that sec. 1002(b)(1) "lists those actions for which the amendments made by this title shall *not* apply * * *." H. Rept. No. 96–317, *supra*, at 182. [Italic in original.] This statement is merely an explanation of sec. 1002(b)(1); it does not indicate that the cases listed above in secs. 1002(b)(3) and 1002(b)(4) are subject to judicial review in accordance with title X. In fact, with respect to duty assessments under sec. 1002(b)(3), this same report states that where an underlying determination was made prior to the effective date of the TAA, it is subject to judicial review in accordance with the law in effect prior to the effective date of the TAA. H. Rept. No. 96–317, *supra*, at 183.

an uninhabited island 7.8 miles to the mainland of Scotland, is not a postage stamp in the common meaning and use of that term.

V. A close similarity between the arrangement of the provisions in the tariff schedules and the Brussels Nomenclature justifies the use of the latter as a source of legislative history with respect to the classifications included within part 5 of schedule 2, TSUS.

VI. In schedule 2, part 5, TSUS, the Congress intended to include reproductive processes, other than those involving the transfer of ink to a substrate by an image carrier, as a "printing process" producing "printed matter." Among those processes is "embossing."

VII. For an article to be "printed matter" under part 5 of schedule 2, TSUS, the essential character of the article is imparted by the textual and pictorial matter contained thereon.

VIII. The merchandise in issue, containing a raised image and lettering which comprise approximately one-third of its total thickness, does not possess a flat shape or form within the intendment of item 790.55, TSUS.

IX. Gold leaf is characterized by its extreme thinness, having a measurement of between three- and five-millionths of an inch in thickness. Articles consisting of thin 23 carat gold strips bearing a raised design thereon cannot be classified as gold leaf under item 644.52, TSUS, in the absence of evidence establishing that the article conforms to the recognized linear measurement.

[Judgment for defendant.]

(Decided March 3, 1980)

Donohue & Donohue (*John P. Donohue, Joseph F. Donohue* and *Russell W. MacKechnie, Jr.*, at the trial and on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Sidney H. Kuflik* at the trial; *Madeline B. Kuflik* on the brief), for the defendant.

BOE, Judge: In the consideration of the issues presented in the above-entitled action, the court has been led into the world of philately, into the industry of printing and graphic arts, and into the science of metallurgy.

The merchandise in question which has prompted such diverse areas of consideration consists of thin rectangular strips of 23 carat gold, backed with an adhesive coating and protected by a release paper.[1] Each gold strip has a dimension of approximately 1½ inches in width by 2 inches in length. On the face thereof a design in a raised figuration consists of the State seal of one of the 13 original American Colonies with the name of the State inscribed immediately below. At the top left of the gold strip there is the lettering "*STAFFA*" followed by the smaller lettering "SCOTLAND". At the bottom left

[1] Plaintiff's exhibit 7.

of the strip appears the lettering "23 carat gold" and laterally opposite thereto, the lettering "postage £6".[2]

The subject merchandise produced and exported by private parties from the United Kingdom was entered at the Port of Minneapolis-St. Paul between September 24, 1975, and November 19, 1975. The merchandise was classified upon importation as articles of gold under item 656.10, TSUS, providing:

SCHEDULE 6.—METALS AND METAL PRODUCTS

PART 3.—METAL PRODUCTS

Subpart G.—Metal Products Not Specially Provided for

Subpart G headnote:

1. This subpart covers only articles of metal which are not more specifically provided for elsewhere in the tariff schedules.

	Articles of precious metal, including rolled precious metal:	
* * *	Of platinum, including rolled platinum	* * *
656.10	Of gold, including rolled gold	20% ad val.
* * *	Of silver, including rolled silver	* * *

The plaintiff claims that the subject merchandise properly is classified as postage stamps under item 274.40, TSUS, providing:

SCHEDULE 2.—WOOD AND PAPER; PRINTED MATTER

PART 5.—BOOKS, PAMPHLETS, AND OTHER PRINTED AND MANUSCRIPT MATERIAL

*	* * * * * * *	
274.40	Postage and revenue stamps, cancelled or not cancelled, and government stamped envelopes and postal cards bearing no printing other than the official imprint thereon	Free

In the alternative the plaintiff claims the merchandise in question should be classified under item 274.70, TSUS, providing:

	Photographs, engravings, etchings, lithographs, and wood cuts, and pictorial matter produced by relief or stencil printing process, all the foregoing, whether bound or not bound, and not specially provided for:	
* * *	Printed over 20 years at time of importation	* * *
	Printed not over 20 years at time of importation:	
*	* * * * * * *	
274.70	Other	4% ad val.

[2] The word "STAFFA" is underlined in order to indicate the larger lettering. The lettering "postage £6" indicates the cost of the stamp in the amount of 6 English pounds.

Or under item 274.90, TSUS, providing:

	Printed matter not specially provided for:	
* * *	Suitable for use in the production of such books as would themselves be free of duty	* * *
	Other:	
* * *	* * * * * *	
	Other:	
* * *	Susceptible of authorship	* * *
274.90	Other	7.5% ad val.

Or under item 790.55, TSUS, providing:

SCHEDULE 7.—SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

PART 13.—PRODUCTS NOT ELSEWHERE ENUMERATED

Subpart A.—Miscellaneous Products

* * * * * * *		
790.55	Sheets, strips, tapes, stencils, monograms, and other flat shapes or forms, all the foregoing articles (except articles provided for in item 790.50) which are pressure sensitive, with or without protective liners, and whether or not in rolls	10% ad val.

Or under item 644.52, TSUS, providing:

SCHEDULE 6.—METALS AND METAL PRODUCTS

PART 3.—METAL PRODUCTS

Subpart C.—Metal Leaf and Foil; Metallics

* * * * * * *		
	Precious metal leaf, whether unmounted or mounted on paper or equivalent backing:	
	Gold leaf:	
* * * * * * *		
644.52	Mounted	3.37¢ per 100 sq. in. + 12.5% ad val.

The merchandise in issue hereafter referred to as Staffa stamps bears the name of the small island of Staffa located approximately 7.8 nautical miles off the coast of Scotland. The island, privately owned and uninhabited, has been developed as a tourist attraction. A boat or ferry carries visitors from the Scottish mainland to the island of Staffa, thence returning to the mainland on the same day. The Staffa stamps are offered for sale on the ferry trip to the island for the sum of 6 pounds (£6). A letter or card with the stamp affixed thereto may be deposited in a receptacle on the island designated for the collection of such letters or cards bearing the Staffa stamp. Staffa Marine Ltd.,

operator of the ferry or boat service, collects the letters and cards daily and transports the same to the mainland where a British postage stamp is then affixed and the letter or card thereupon deposited in an official British post office for transmission to the respective designated destinations.[3]

I

In the consideration of plaintiff's primary claim that the subject merchandise should be classified as postage stamps under item 274.40, TSUS, the court directs its initial attention to a determination of the meaning of the term "postage stamps" as intended by the Congress in the enactment of the tariff schedules and the concomitant determination whether the merchandise in issue falls within such an intended meaning. Recognizing that in its determination of the meaning of the term "postage stamp" as a matter of law, the court may refer to dictionaries, lexicographic authorities, and texts, as well as consider the testimony of witnesses offered with respect thereto, the respective counsel have not been reticent in proffering such advisory counsel and authoritative assistance. *United States* v. *O. Brager-Larsen*, 36 CCPA 1, C.A.D. 388 (1948); *Floral Arts Studio* v. *United States*, 46 CCPA 21, C.A.D. 690 (1958).

The plaintiff, in support of its claimed classification under item 274.40, TSUS, contends that the common meaning attributed to the term "postage stamps" is the meaning of that term as used and understood in the philatelic world and that, in fact, the term as used in the tariff schedules draws its definitive meaning therefrom. In so doing, the plantiff has presented witnesses, highly respected in the philatelic community, whose testimony as to the meaning of the term "postage stamps," as well as a variety of other terms used in the study and collection of stamps and stamplike items, is restricted solely to the philatelic usage. Thus, it would appear that the plaintiff assumes that the establishment of a specific philatelic meaning of the term "postage stamps," ipso facto, causes that meaning to be the common meaning thereof. No testimony or authority, however, has been presented in support of this reasoning.

On the contrary, it is well recognized that in including an article in the tariff schedules, the Congress is deemed to have used the name of such an article in the commercial sense, which, in the absence of evidence to the contrary, shares the same meaning as the common ordinary usage thereof. *United States* v. *Victoria Gin Co.*, 48 CCPA 33, C.A.D. 759 (1960); *United States* v. *C. J. Tower & Sons of Buffalo, N.Y.*, 48 CCPA 87, C.A.D. 770 (1961). It is self-evident from the testi-

[3] Plaintiff's witness, Williams, testified that the £6 charge for a Staffa stamp was twice the amount of the British post office rate and, accordingly, would entitle a purchaser to have affixed to his letter or card British postage stamps in an additional amount up to £3 (r. 337). The witness further testified that the postal charge for transporting a post card within Great Britain is 7 pence or 9 pence (r. 343).

mony adduced as well as from an examination of the many exhibits received in evidence that the study of philately is a vocation or an avocation, as the case may be, which is specialized in character. Its glossary contains terms the usage of which in many instances is pertinent and refers solely to that field of study. The term "postage stamps," on the other hand, throughout the years has been used in the ordinary course of communication and commerce between peoples of this world. If a distinction might exist between a philatelic meaning of the term "postage stamps" and general common meaning thereof as used in the nonphilatelic world, it is improbable that the Congress intended the term to have a meaning other than the connotation commonly accepted in the everyday social and business communities of our country.

Reference to dictionary and lexicographic definitions of the term "postage stamp" offered in evidence as well as independently consulted by this court indicates the presence of two prerequisites in order to be included within the definition: (1) Its issuance or specific authorization by a government, and (2) its issuance as a prepayment of a postal charge.

In "Webster's New World Dictionary of the American Language" (1960) (defendant's exhibit F), a postage stamp is defined as:

> A *government stamp* to be put on a letter or package as a *sign that the postage has been prepaid:* It is either a small printed gummed label or a design imprinted on an envelope, postal card, etc. [Italic supplied.]

In "Funk & Wagnalls New Standard Dictionary of the English Language" (1933) (defendant's exhibit C), a postage stamp is defined as:

> A small engraved or printed label, *issued by a government*, to be affixed to letters, etc., *as evidence that the amount indicated on the stamp has been prepaid.* [Italic supplied.]

In "Black's Law Dictionary" (1968) (defendant's exhibit E) a postage stamp is defined as:

> A ticket *issued by government*, to be attached to mail-matter, that *represents the postage or fee paid* for the transmission of such matter through the public mails. [Italic supplied.]

In The American Heritage Dictionary of the English Language (1969) (defendant's exhibit B), a postage stamp is defined as:

> A small engraved usually adhesive label *issued by a government* and sold in various denominations to be affixed to items of mail as *evidence of the payment of postage.* [Italic supplied.]

"The Musson Stamp Dictionary" (1972) (defendant's exhibit G) indicates the accepted definition of a postage stamp as:

> An authorized document (stamp) in use since 1840 that is affixed to mail of any kind *that governments accept* for transmission *to indicate the prepayment of postal charges.* [Italic supplied.]

In the absence of language in the statutory provision in question expressing the intended legislative meaning, it is appropriate that reference be made to sources which may evidence such Congressional intent. *Textile Printing & Finishing Co., Inc.* v. *United States*, 49 CCPA 24, C.A.D. 789 (1962); *United States* v. *J. Eisenberg, Inc.*, 43 CCPA 105, C.A.D. 616 (1956). The "Summaries of Trade and Tariff Information" prepared and published by the then U.S. Tariff Commission, as to the description and use of postage and revenue stamps included under item 274.40, TSUS, provides:

> The postage and revenue stamps considered here include such stamps, canceled or uncanceled, and Government-stamped envelopes and postal cards (or stamped paper) bearing no printing other than the official imprint thereon. They may include official stamps and stamped paper of any nation, past or present.
>
> The articles here considered thus consist of two distinct but related types: (1) *Stamps and stamped paper printed by or for national governments to be used for postage and revenue purposes*, and (2) *the same kinds of stamps and stamped paper*, canceled or uncanceled, *collected by philatelists*.
>
> The value of stamps or stamped paper for official purposes is determined by their face value, and that of stamps or stamped paper for collections, largely by their rarity (Schedule 2, vol. 5 (1970) at 85 [italic supplied].)

It is clear from the foregoing that, recognizing the variety of stamps collected by philatelists and their possible respective values, it was the intention of Congress to include under item 274.40, TSUS, as duty free, only those postage stamps "printed by or for national governments." By this inclusion, such postage stamps imported into the United States solely for philatelic purposes are afforded the same duty-free treatment as a stamp "to be used for postage and revenue purposes." In the use of the term "postage stamps" under item 274.40, TSUS, the Congress has not intended to place upon such articles a meaning, as urged by the plaintiff, allegedly arising within the philatelic world. Rather, as indicated by the "Summaries," the philatelist may enjoy the gratuity of a tariff exemption only if the stamps imported for philatelic purposes are those which have been "printed by or for national governments to be used for postage and revenue purposes."

It is undisputed that the Staffa stamps are produced and sold by private parties without affirmative government authorization of any kind. The plaintiff urges, however, that the absence of a specific prohibition by the Government of Great Britain against the issuance and sale of these stamps constitutes an authorization therefor. An examination of the Post Office Act of 1969 by which the Ministry of Posts and Telecommunications and the British Post Office were created for the United Kingdom, serves to evidence the lack of recog-

nition of the Staffa stamps as postage stamps within the meaning of this legislation.[4] Section 7 of the act provides:

> 7.—(1) The post office shall have power—
> (a) to provide postal services (including cash on delivery services) and telecommunication services; * * *. [*Id.* at 6.]

Section 23 of the act relating to the exclusive privilege of the post office with respect to the conveyance of letters provides explicitly for the sole manner by which letters might be sent and delivered other than by and through the post office:

> 23.— * * * (2) The said restriction is that the power to authorise letters to be sent, conveyed and delivered otherwise than by post and the collection of letters otherwise than by an officer of the post office which is conferred by the proviso to subsection (1) of the said section 3 and with which the post office becomes invested by virtue of the foregoing subsection *shall not be exercisable except with the consent of, or in accordance with the terms of a general authority given by,* the Minister. (Id. at 26 [italic supplied].)

No evidence is found in the record indicating the consent of or the general authority given by the Minister of Posts for the use of Staffa stamps in the conveyance and delivery of letters. On the contrary, it is undisputed that in order to permit the conveyance and delivery of a letter within the United Kingdom and/or the jurisdiction of the British Post Office, there must be placed thereon, notwithstanding the Staffa stamp that might have been affixed thereto, a postage stamp evidencing the prepayment of postage chargeable by the British Post Office.[5]

This court, therefore, concludes that the term "postage stamps" as included in item 274.40, TSUS, refers to those stamps "printed by or for national governments to be used for postage purposes," a requisite proof which has not been successfully established with respect to the merchandise in issue.

The foregoing discussion of the court has been premised upon the assumption that the philatelic meaning of the term "postage stamps" might be other than that which the court has found to be the proper common meaning of the term for tariff purposes. From the evidence adduced herein, however, this court is of the opinion that a variance in meaning in fact does not exist. Although the testimony of the witnesses in behalf of the respective parties is in part conflicting, the

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[4] Defendant's exhibit Y.

[5] The Post Office Act of 1969, section 123 provides:

> In the foregoing provisions of this part of this act, "postage" (except in the expression "duties of postage"), means postage chargeable by the post office, and "*postage stamp*" *shall be construed accordingly.* (Defendant's exhibit Y [italic supplied].)

court is satisfied that the very evidence presented by the plaintiff fails to support a contrary conclusion.

Mr. L. N. Williams, a highly respected philatelic authority, testifying in behalf of the plaintiff that the Staffa stamps are postage stamps in a philatelic meaning and usage, predicates his conclusion on: (1) The fact that the Staffa stamps perform the function of a postage stamp, i.e., they serve as evidence of prepayment of a charge for the carriage of mail; and (2) that notwithstanding the island of Staffa is uninhabited, a need for a mail service therefrom to the mainland exists. Mr. Williams, in support of his characterization, states that the term "postage stamp" is a generic term. He significantly adds, however, that in the philatelic world, the Staffa stamps are referred to and, accordingly, specifically designated as private local stamps or local stamps. In viewing the total evidence presented in its full context, including the impressive testimony of defendant's witnesses, and in the examination of the many exhibits and source materials introduced by the respective parties, the court is of the opinion that in the philatelic world the terms private local stamp and local stamp possess a different and distinct meaning from that of a postage stamp. It most clearly appears that the foregoing terms are not synonymous in the philatelic world in that by their very restrictive and specific designation, their origin, use and character, private local stamps and/or local stamps describe an article recognized as constituting a singular classification in itself.

"Scott's 1978 Standard Postage Stamp Catalogue," one of the foremost authoritative sources in the philatelic world, in its preface to volume 1, entitled "Information for Collectors," categorizes the variety of stamps, other than postage stamps, in which a collector may be concerned or interested:

> CINDERELLAS AND FACSIMILES
>
> *Cinderella* is a catchall term used by collectors of phantoms, fantasies, *bogus items*, municipal issues, exhibition seals, local revenues, transportation stamps, labels, poster stamps, etc. Cinderellas are not issued by any national government for postal purposes. Some cinderella collectors include local postage issues, telegraph stamps, essays and proofs, forgeries and counterfeits.
>
> A fantasy is an adhesive created for a nonexisting stamp issuing authority. Fantasy items range from imaginary countries (Kingdom of Sedang or Principality of Trinidad) to nonexisting locals (Winans City Post), or nonexisting transportation lines (McRobish & Co.'s Acapulco-San Francisco Line). On the other hand, if the entity exists and might have issued stamps or did issue other stamps, the items are *bogus* stamps. These would include the Mormon postage stamps of Utah, S. Allan Taylor's Guatemala and Paraguay inventions, the propaganda issues for the South Moluccas and the adhesives of the Page & Keyes local post of Boston.

Both fantasies and *bogus issues* are sometimes called phantoms. (Id. at xi [italic supplied in part].) [6]

It is worthy of note that in "Scott's Standard Postage Stamp Catalogue" all stamps listed therein in the main are postage stamps having been issued by and/or under the authority of a recognized existent government.[7]

In that portion of "The Stamp Collector's Handbook" introduced into evidence by the defendant, we find a more specific definition of the term "bogus items" referred to previously in the aforecited quotation from Scott's catalogue:

> *Bogus Stamps*
>
> *Stamps which have not been issued by a recognized or existent government.* Most are of private origin, especially for disposal to collectors. This kind of material is not to be classified as stamps. They are in the category of labels and philatelically are seldom worth more than the paper on which they are printed. Examples are Bolivian railway issue, and some unauthorized Confederate stamps.[8] [Italic supplied.]

With respect to the terms private local stamps and local stamps, which plaintiff's witnesses testify are the specific designations of the Staffa stamps, "The Stamp Collector's Handbook" makes the following explanation:

> *Private Issues*
>
> These are divided into two classes: Those with the sanction of the government such as local issues and the U.S. 1864–1899 match and medicine revenue stamps. In this category may also be included telegraph, aviation, welfare, and other stamps serving private interests. In the other group are those which have been privately made as labels, poster stamps, and facsimiles designed to imitate or resemble regular stamps.[9]

As previously indicated herein, recognized authoritative standard postage stamp catalogues, whether British or American, do not include private local issues for the reason that they are not valid as national or international postage stamps. It is only in some specialized compilations, therefore, that local or private issues are so included. One such specialized compilation is the "Catalogue of British Local Stamps" by Gerald Rosen.[10] Contained in this compilation, devoted only to local stamps, is a "Report of the Stamp Trade Standing Committee—British Private Local Issues," providing in pertinent part:

> These are produced by owners of British Islands to prepay the cost of ferrying letters and parcels to the nearest point on the

[6] Plaintiff's exhibit 21.

[7] Local stamps have been included in a separate and individual publication known as "Scott's United States Stamp Catalogue Specialized" (1976). Plaintiff's exhibit 22.

[8] Defendant's exhibit EE, at 103.

[9] Id.

[10] Plaintiff's exhibit 20.

> mainland. *They are not valid for national or international postage, and the British Post Office does not recognise them as postage stamps.* Nevertheless, some islands, such as Herm and Lundy, have been producing these locals for over 30 years, and they appear to have been of interest to visitors. Other islands have started within the last few years.
>
> These issues are not listed in standard British catalogues, but some appear in certain specialised works. The following descriptions of the various islands give some indication of the extent to which these locals may be used. In accordance with GPO regulations, local issues are placed on the backs of the envelopes. (Id. at 129 [Italic supplied].)

From the foregoing authorities it is clear that private local stamps issued for the purpose of transporting mail by private carrier from an offshore island to the mainland of the United Kingdom cannot be designated postage stamps, absent a consent or authorization by an existent government.

However, the plaintiff through its witness, L. N. Williams, urges that in the instant action an established "need" for the transportation of mail from the island of Staffa serves to cause the Staffa stamps to assume the identity of postage stamps. Except for the plaintiff's foregoing assertion, the court finds no authority supportive of this contention. In the philatelic world the determination of an established "need" for the transportation of mail is a criterion relating to the validity of and the justification for the issuance of private local stamps only.

Although unnecessary for a determination of the issue presently under consideration, it is deemed helpful in assessing the weight to be given to the testimony of the respective witnesses to examine the nature of the "need" which the plaintiff contends through its witness, Williams, to exist for the transportation of mail, a total distance of 7.8 miles, from the uninhabited island of Staffa to the Scottish mainland. In the opinion of the court this "need" in actuality is rather a promotional merchandising plan wherein an attractive and novel souvenir is sold to a tourist which may be retained by the buyer in such form or affixed to a letter or card and carried back by the ferry company, transporting the tourists, to an official mail depository on the mainland where appropriate charges are paid and British postage stamps affixed for transmittal of the letter or card under the postal laws of the United Kingdom. Any "need" created is only incidental to and in furtherance of the primary purpose, i.e., the sale of a 23 carat gold souvenir.

It would appear that the witness, Williams, has not at all times voiced the opinion concerning which he testified in the trial of this action. In a publication designated "Cinderella Stamps" authored by

the witness—L. N. Williams, and his brother, M. Williams, relating to bogus or phantom issues, a severe indictment is directed to the offering of souvenir labels, similar in form to the merchandise in issue, as postage stamps.[11] The conclusions therein drawn by the witness best can be expressed in the article which bears his name:

> The 1960's saw the appearance of several sets of phantoms which we unhesitatingly condemned at the time and we repeat the warning here. The promoters of these labels attempted to foist them on to the collecting public as stamps for local postal services. Had it not been for the popularity of Cinderella material generally and local stamps in particular it is certain that these so-called stamps would never have appeared on the market.
>
> *Jethou.*—An early offender was the occupier of Jethou, one of the smaller Channel Islands. According to our information from a reliable source Jethou labels are *not* local postage stamps, despite implications to the contrary published no doubt by interested parties. The total population of Jethou is four, of whom two are the occupier and his wife! Obviously there can be no possible need of a local postal service, certainly not at the time of year when there are no tourists. Yet despite this fact the Jethou labels have been overprinted "Europa 1961" and offered as local postage stamps. The only use for such an issue would be by the occupier on his own (or his wife's) mail, for which he must charge himself a fee, an obviously farcical state of affairs.
>
> In summer there is a certain amount of tourist traffic to the island, but as one could walk round it in little more than an hour nobody would want to stay long enough to engage in correspondence except possibly to hand in a souvenir postcard. However, it was far easier and quicker to post such a card on nearby Gurnsey, to which mail must, in any case, be sent. So there was no need at all for any issue of postage stamps on Jethou, *and the unoverprinted labels must be regarded simply as souvenirs, not local stamps. At best they were a bogus issue, on a par with the phantoms of the South Moluccas, Free Rumania, the Indonesian Republic, and similar items.* (Id. at 99 [italic supplied in part].)

Nor is the opinion voiced by the witness, Williams, at the trial of the within action shared by his colleagues in the philatelic world. The Cinderella Stamp Club is an association of amateur and professional philatelists who are primarily interested in local stamps, bogus and phantom issues, Christmas seals, and other miscellaneous labels. As editors, the witness, L. N. Williams, and his brother, M. Williams, published for the Cinderella Stamp Club a journal entitled "The Cinderella Philatelist." Contained in an issue thereof under date of April 1975 is an article by a contributor relating to "British Off-Shore Island Postal Services." [12] In addressing the question as to

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[11] Defendant's exhibit W.
[12] Defendant's exhibit X.

when a need might exist justifying a "local post" and the issuance of stamps, the author states:

> But assuming that any local post is legal, which set of circumstances justifies the issue of stamps? The island must have a population, and by population I mean people that live on the island year in year out. Uninhabited islands cannot, by any stretch of the imagination, be regarded as having a need for a local post. It has often been stated that certain islands, mentioned in these notes, have many summer visitors; most, if not all, are one-day visitors only. One-day visitors, no matter how many, do not constitute a need for a postal service. Any visitor who does "post" a letter or postcard is only taking advantage of the postal facility, and had this facility not been available he would not even have thought of sending any letter. [Id. at 31.]

The article continues by examining approximately 22 islands offshore of the United Kingdom with respect to size, habitants, relationship to the mainland, need for postal service, and the evaluation of the type of stamp issued in connection with each respective island. Specific reference therein to the island of Staffa and the Staffa stamps bears the following evaluation:

> As this is an uninhabited island no postal need exists.
> *Conclusion:* Stamps are labels only. [Id. at 57.]

From all of the evidence submitted, including the testimony of the highly qualified witnesses presented by the Government, the court makes the following findings with respect to the issues presented in connection with the plaintiff's claimed classification of the subject merchandise under item 274.40, TSUS:

(1) That the common meaning of postage stamps as used in item 274.40, TSUS, is a label issued by a government which may be affixed to mail evidencing prepayment of charges for the transmission thereof through its postal service.
(2) That the Staffa stamps, the merchandise in issue, have not been issued by any government or by the specific authority thereof, and, accordingly, are not postage stamps within the purview of item 274.40, TSUS.
(3) That the philatelic meaning of the term "postage stamps" is synonymous with the common meaning and usage of that term determined by this court.
(4) That the Staffa stamps under philatelic meaning and usage are characterized within the general classification of Cinderella stamps, which bear a meaning different and distinct from the term "postage stamps."

II

Plaintiff's alternative claims of items 274.70 and 274.90, TSUS, are classified under part 5 of schedule 2 entitled: "Books, Pamphlets and Other Printed and Manuscript Material." Headnote 1 of part 5 provides:

Part 5 headnotes:

1. Except for decalcomanias, labels, flaps, and bands, all of which are covered by the provisions therefor in this part, regardless of the nature of the printing thereon, this part covers only printed matter consisting essentially of textual and pictorial matter produced by any printing process, and similar matter in manuscript or typewritten form. The text may be set forth in any language by means of any kind of characters. With the exceptions above indicated, this part does not cover any article in which printing is merely incidental to the primary use of the article or in which printing is employed mainly for coloration or to produce a decorative or novelty effect (see part 4 of this schedule).

It is not in dispute that the raised design on the merchandise in question is produced by an embossing process. In seeking a determination of plaintiff's claimed classification by the court, the parties present a single question of law, to wit—Is embossing a "printing process" whose product can be "printed matter" within the purview of part 5 of schedule 2, TSUS.

Extended testimony has been introduced by the plaintiff and the defendant in their respective efforts to establish the meaning of the term "printing." The meaning of this term, as contended by the plaintiff, is best characterized by one of its witnesses who testified that in the printing trade, the term "printing" is understood to mean "the transference of, or the duplication of an image on a material." With respect to the term "printing process," the witness testified that the term means "many of various processes that will transfer or reproduce an image on a material." [13]

The defendant, on the other hand, contends that the term "printing" bears a more restrictive and definitive meaning in that ink is a necessary ingredient in the "printing process" and refers to the transfer of an ink or an inklike substance from a plate or other image carrier to a substrate. In support thereof the defendant refers to the elements of the "printing process" enumerated in the book, "The Printing Industry" (1967) by Victor Strauss:

> All printing production entails a combination of four elements: (1) A printing-image carrier, (2) paper or another printing stock, (3) printing ink, and (4) a printing press. Each of these four elements contributes in some measure to the appearance of printed images. [Id. at 12.]

However, it is not the function of the court to determine in this proceeding the meaning of the term "printing" in the printing trade, but rather, to discern the congressional intent with respect to its meaning as used in the enactment of the tariff schedules. *United States* v. *S. H. Kress & Co.*, 46 CCPA 135, C.A.D. 716 (1959). In the

[13] Plaintiff's witness Stanchfield. (r. 288).

"Tariff Classification Study Submitting Report" (November 15, 1960), it is acknowledged that "(t)he 'Brussels Nomenclature' and the 'Standard Industrial Classification Manual' exerted the greatest influence on the arrangement of the proposed revised schedules." Id. at 8. Reference to the "Explanatory Notes to the Brussels Nomenclature" as a source of legislative history with respect to the classifications included within part 5 of schedule 2, TSUS, is appropriate. Particularly is this true in view of the close similarity between the arrangement of the provisions in the two respective schedules. *United States* v. *Abbey Rents*, 66 CCPA 2, C.A.D. 1213, 585 F. 2d 501 (1978).

Chapter 49 of the "Brussels Nomenclature" is entitled "PRINTED BOOKS, NEWSPAPERS, PICTURES AND OTHER PRODUCTS OF THE PRINTING INDUSTRY; MANUSCRIPTS, TYPESCRIPTS AND PLANS." A close similarity exists between the headnotes to schedule 2, part 5, TSUS, and the "Explanatory Notes" for chapter 49 of the "Brussels Nomenclature" providing in pertinent part:

> With the few exceptions referred to below, *this chapter covers all printed matter of which the essential nature and use is determined by the fact of its being printed with characters or pictorial matter.*
>
> On the other hand, paper, paperboard or cellulose wadding, or *articles* thereof, *in which the printing is merely incidental to their primary use * * * fall within chapter 48*, and printed textile *articles * * * in which the printing is mainly for decorative or novelty purposes and does not affect the essential character of the goods, fall within chapter 61.*
>
> For the purpose of this chapter, the term "printed" includes not only reproduction by the several methods of ordinary hand and mechanical printing (lithography, offset printing, heliography, photogravure, etc.), but also by engraving, reproduction by duplicating machines, *embossing*, photography, etc., irrespective of the form of the characters in which the printing is executed (e.g., letters of any alphabet, figures, shorthand signs, Morse or other code symbols, Braille characters, musical notations, pictures, and diagrams). *The term does not, however, include coloration, decorative or repetitive-design printing.* [Italic supplied; italic in original omitted.]

There is also a close similarity between many of the items classified under schedule 2, part 5, TSUS, and the items classified under chapter 49 of the "Brussels Nomenclature." Particularly relevant is heading 49.11 of the latter schedule providing:

> 49.11 Other printed matter, including printed pictures and photographs.

In items 274.50–.70, schedule 2, part 5, TSUS, it will be noted that Congress likewise has included "photographs." With reference thereto, headnote 2(d) of part 5 of schedule 2 provides in pertinent part:

> *Part 5 headnotes:*
>
> * * * * * * *

2. For the purposes of this part—

* * * * * * *

(d) the term "*photographs*" embraces only pictures other than motion pictures, produced on photosensitive materials, and includes positive and negative images on exposed, or exposed and developed, photographic film. [Italic in original.]

When photographic film is exposed to light, the exposure produces an *invisible* change in the layer or coating (emulsion) on the photographic film, called the latent image, which does not become visible until the film is developed. *See* 10 McGraw-Hill Encyclopedia of Science and Technology, at 175–76. Inasmuch as the invisible image on exposed, but not yet developed, photographic film is classified under part 5 of schedule 2 of TSUS, it must be presumed that the Congress intended such photographic film to be considered therein as "printed matter * * * produced by any printing process." [14] A similar presumption must be made with respect to item 274.45, TSUS, under part 5 of schedule 2, providing:

274.45 X-ray film exposed, whether or not developed.* * *

To accept defendant's argument that "printed matter" under part 5 must be produced by a process which transfers ink from an image carrier (e.g., a plate or type) to a substrate, producing a visible image, would be to contravene the clear intent of Congress. The defendant further contends that inasmuch as the terms "embossed" and "printed" are referred to separately in several provisions in part 4 of schedule 2, TSUS, the Congress, by so doing, has recognized that "embossed" articles are not "printed." Accordingly, it is contended that in part 5 of schedule 2, the term "printed" should exclude the term "embossed."

The presumption that Congress intends a word or a phrase used in different parts of the tariff schedules to bear the same meaning throughout the schedules is applicable *only* in the absence of any clear indication of a contrary intent.[15] In headnote 1 of part 5, "printing," as employed to produce textual and pictorial matter, is specifically distinguished from "printing," as employed for coloration or a decorative effect, provided for in part 4 of schedule 2, TSUS. The intention of Congress not to attribute the same meaning to the word "printing" in all classifications in which the term is included was evidenced in the Tariff Act of 1930. Paragraphs 1409 and 1410 thereof would indicate that it has been the intention of Congress that the determination as to whether a product of a particular process constitutes

[14] In a case decided under the Tariff Act of 1913, the Board of General Appraisers held that photographs were not "printed matter" as used in the Tariff Act, presumably because the photographic image is not produced by printing type or ink. *See Meadows, Wye & Co.* v. *United States*, 38 Treas. Dec. 653, T.D. 38505 (1920).

[15] *Productel Chemical Co.* v. *United States*, 74 Cust. Ct. 138, C.D. 4598 (1975).

"printing" depends upon the particular use to which the product is put. The court, therefore, concludes that Congress intended to include reproductive processes, other than those involving the transfer of an ink to a substrate by an image carrier, as "printing processes" producing "printed matter" classifiable under part 5 of schedule 2, TSUS. Among those reproductive processes is "embossing."

Notwithstanding that embossing may be "printed matter" within the purview of part 5 of schedule 2, the court is satisfied that this determination alone is not dispositive of the issue as to whether the embossed merchandise in the instant case can be classified under item 274.70 or 274.90, TSUS, as claimed by plaintiff. Headnote 1 of part 5 of schedule 2 provides in relevant part that with certain enumerated exceptions:

> * * * this part covers only printed matter consisting *essentially* of textual and pictorial matter produced by any printing process * * *. [Italic supplied.]

The tariff schedules do not define the term "essentially of." In construing this phrase, particularly in the context of headnote 1, the court again finds instructive the "Explanatory Notes" to chapter 49 of the "Brussels Nomenclature" which provides in relevant part:

> With the few *exceptions* referred to below, this Chapter covers all printed matter of which the essential nature and use is determined by the fact of its being printed with characters or pictorial matter. [Italic in original.]

This court is in agreement with the foregoing and is of the opinion that for an article to be "printed matter" under part 5, the essential character of the article must be imparted by the textual and pictorial matter contained thereon. Neither a visual examination of the Staffa stamps nor the evidence submitted relating thereto permits such a conclusion.

The merchandise in question is solely distributed in the United States by Calhoun's Collectors Society, Inc. Calhoun's produced an advertising brochure concerning the Staffa stamps.[16] At the top of the first inside page the brochure states, "See how surprisingly little it now costs to acquire gold." On the same page it describes the merchandise as "[a] rare series of stamps for collectors and investors * * * minted from pure 23 KARAT GOLD." Later in the brochure the Staffa merchandise is described as:

> An unusually inexpensive and guaranteed loss-free way to invest in the great collectibles and gold boom.
>
> Precious metal has always been favored as a hedge against inflation. Especially when worked into items that have artistic value as well. A Picasso plate in sterling, for example, has double

[16] Defendant's exhibit J.

value. Its artistic value as a Picasso *and* its monetary value as silver.

* * * * * * *

* * * [The Official-Seal Stamps] have exceptional collector's value because they are extraordinarily rare stamps—minted by hand in high relief, not merely printed. *And* they have definite monetary value as well, because they are made of *pure 23K gold instead of paper.* [Italic in original.]

The excerpts from the advertising brochure, which the court finds to be the only evidence offered pertinent to the inquiry concerning the essential character of the Staffa stamps, indicate to the court that the desirability of the merchandise is derived equally, if not principally, from the gold as a source of monetary value having an excellent investment potential and as a unique and novel substrate for the design thereon. It cannot be said that the essential character of the merchandise is imparted from the printed matter. *See Marshall Co.* v. *United States*, 67 Cust. Ct. 316, C.D. 4291, 334 F. Supp. 643 (1971). In viewing the evidence in its entirety, the court finds that the plaintiff has not provided the quantum of evidence sufficient to establish that the essential character of the merchandise in question is the printing thereon. In sum, the plaintiff has failed to rebut the presumption of correctness that "attaches not only to the ultimate conclusion of the collector that the goods are properly classified in a particular category, but also to every subsidiary fact necessary to support that conclusion." *See United States* v. *New York Merchandise Co.*, 58 CCPA 53, 58, C.A.D. 1004, 435 F. 2d 1315 (1970).

III

Plaintiff further claims in the alternative that the merchandise in question should be classified under item 790.55, TSUS, which provides in pertinent part:

Sheets, strips, tapes, stencils, monograms, and other flat shapes or forms, all the foregoing articles (except articles provided for in item 790.50) which are pressure sensitive, with or without protective liners, and whether or not in rolls----------	* * *

In schedule 7, part 13, subpart A, "pressure sensitive" is defined as:

Subpart A headnotes:

* * * * * * *

2. The term "*pressure sensitive,*" as used in items 790.50 and 790.55, refers to articles which have an adhesive coating on one or

both surfaces that will adhere to other surfaces upon the application of pressure only.[17]

Defendant contends that the articles are not "flat" within the meaning of subpart A. Inasmuch as Congress has not defined "flat" as used in 790.55, TSUS, the court again resorts to the use of standard lexicographic sources and other extrinsic aids. "Flat" is defined in Webster's Third New International Dictionary (1966) as:

> 1. Having or marked by a continuous surface that is horizontal or nearly so without significant curvature or inclination and without *noteworthy* elevations or depression * * *. [Italic supplied.]

With respect to the above definition, the following exchange between defendant's counsel and plaintiff's witness, Blank, on cross-examination, proves informative:

> Q. Would you have any idea approximately how high that image is raised?—A. My guess would be around two to three-thousandths of an inch. I could measure that but I don't have the instruments here.
> Q. Considering the relative thinness of this stamp, would that be a considerable raised portion?—A. Yes. Possibly one-third of it, or something like that (R. 245–46).

In the production of the Staffa stamps the lettering and design thereon are created by raising a part of the substrate from the remaining portion thereof. The only evidence submitted relating to the contours of the surface of the subject merchandise is the above-quoted testimony—approximating the raised image to comprise about one-third of the stamp's total thickness. Such an elevation in the form of a raised design manufactured or produced upon a substrate, which in its original form possessed no elevations or depressions, indeed, must be deemed "noteworthy" when viewed in relation to the article of which it has become a part and is not incidental thereto.

It is the opinion of the court that the surface of the Staffa stamps is not flat within the intendment of part 13, subpart A of schedule 7.[18]

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[17] Plaintiff alleged in paragraph 14 of its complaint that the Staffa articles were pressure sensitive. Defendant in paragraph 14 of its Answer responded to paragraph 14 of plaintiff's Complaint with "Denies." The defendant has admitted on page 70 of its brief that the fact as to the merchandise being "pressure sensitive" is not in dispute. Therefore, the court concludes that the "pressure sensitive" characteristic of the merchandise was never in dispute and will be taken as established. An examination of the articles in question (plaintiff's exhibit 7) reveals that some of the articles have what appears to be an adhesive coating.

[18] The "Explanatory Notes" to heading 48.05 of the "Brussels Nomenclature," though perhaps not a source of legislative history for 790.55, TSUS, provides insight into the meaning of "flat" in reference to embossed articles:

> 48.05—Paper and Paperboard, Corrugated (With or Without Flat Surface), Creped, Crinkled, Embossed or Perforated, in Rolls or Sheets.
>
> This heading covers a variety of papers and paperboards in rolls or sheets having the common characteristic of having been *worked during or after manufacture in such a way that they are no longer flat* or of uniform surface. It includes:
>
> * * * * * * *
>
> (3) * * * *Embossed* papers and boards are those on which a perceptible unevenness of surface has been obtained * * * by pressing it with engraved or embossed metal plates. * * * [Italic supplied.]

Accordingly, the subject merchandise cannot be classified under item 790.55, TSUS, as sought by plaintiff's alternative claim.

IV

The evidence submitted by the plaintiff in support of its last claimed alternative classification, item 644.52, TSUS, at best, can be characterized as negligible. In attempting to meet its burden of proof, the plaintiff relies on representative samples of the merchandise in question (plaintiff's exhibit 7), and a single conclusional statement contained in the testimony of one of its witnesses.[19]

It is well recognized that an exhibit said to be representative of the merchandise in question may be a potent witness. *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C.A.D. 676 (1958). However, to present an exhibit to the court without submitting accompanying evidence, by testimony or otherwise, indicating wherein it conforms to the specifications commonly recognized to describe the article concerning which classification is claimed, causes the exhibit to be of little value.

It is acknowledged without dispute that the substrate of the Staffa stamps consists of thin sheets of 23 carat gold. The only testimony, however, which serves to relate in any manner this merchandise to gold leaf is found in the answer to the question of plaintiff's counsel as to whether the witness would characterize the Staffa stamps as gold metal leaf, mounted. In answer thereto, the witness stated:

> A. Yes. They could be classified as gold metal leaf mounted, because that, in effect, is what they are.[20]

This testimony in its most favorable light can be deemed little more than a conclusion of the witness and gives no assistance to the court in determining whether specifications and characteristics of the gold substrate of the Staffa stamps fall within the meaning of gold leaf as contemplated by item 644.52, TSUS. As our appellate court has stated with respect to testimony of a similar nature in the case of *Keer, Maurer Company* v. *United States*, 46 CCPA 110, C.A.D. 710 (1959): "[W]e believe this testimony to be at most mere *declarations of an essential ultimate fact in issue*, without any corroborating evidence." Id. at 115. [Italic supplied.]

In the absence of any definitive meaning of the term "gold leaf" contained in the tariff schedules, the court again will turn to dictionaries and other recognized authoritative sources in order to determine the congressional intent as to the meaning of that term. In Webster's Third New International Dictionary (1966), "gold leaf" is defined as:

> A sheet of gold ordinarily varying from four to five millionths of an inch in thickness that is used esp. for gilding and lettering on glass.

[19] Plaintiff's witness, Blank.
[20] R. 232.

The "Summaries of Trade and Tariff Information" (1968), schedule 6, volume 5 at 135, describes "metal leaf" and, in particular, "gold leaf":

> Metal leaf is extremely thin metal usually made by beating thin metal sheets, first between sheets of parchment, then between sheets of animal membrane (goldbeater's skin) or, more commonly now, between sheets of thin, tough plastic. Gold leaf (items 644.46–.52), the thinnest metal leaf, is between three- and four-millionths of an inch thick. Mounted gold leaf is leaf that has a backing of tissue paper adhering to it for ease in handling * * *.

The court is satisfied that the term "gold leaf" possesses a meaning more specific and definitive than the description—a "thin" or "very thin" sheet of gold metal, as the merchandise in question is generally referred to throughout plaintiff's testimony. The foregoing definitions indicate that to constitute an article denominated "gold leaf," it must qualify in particular with respect to a specific specification, i.e., the thickness thereof must be within three- to five-millionths of an inch.

As to what thickness the Staffa stamps comprising exhibit 7 may be, the evidence is silent. Accordingly, this fact remains undetermined. A visual examination of the exhibit by the court cannot and does not serve as a substitute for the establishment by the evidence of the specific linear measurement recognized to be determinative of an article known as "gold leaf." Indeed, it might well be that evidence could have been brought before this court sufficient to establish the Staffa stamps should be classified as gold leaf, mounted, under the provisions of item 644.52, TSUS. Suffice it to say, it is the conclusion of the court that the plaintiff has failed to sustain its dual burden of proof as to this claimed alternative classification.

For the reasons hereinbefore discussed in connection with its determination of the successive claimed alternative classifications, it is the opinion of the court that the plaintiff has failed to overcome the presumption of correctness attaching to the classification of the subject merchandise by the Customs officials.

Let judgment be entered accordingly.

(C.D. 4847)

RSMC INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 77–4–00572

[Judgment for defendant.]

(Decided March 12, 1980)

Doherty and Melahn (*William E. Melahn* at the trial and on the briefs) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Saul Davis* at the trial and on the brief), for the defendant.

MALETZ, Judge: The problem in this case is to determine the proper tariff classifications of items invoiced as "E–22 champagne goblets" that were exported from Spain and entered at the port of Boston in April and May 1973.

The merchandise was classified by Customs under item 653.75, TSUS, as articles of metal, coated or plated with gold, and assessed duty at the rate of 20 percent ad valorem. Plaintiff claims the merchandise is properly classifiable under item 653.80, TSUS, as articles of metal, coated or plated with silver, dutiable at the lesser rate of 8.5 percent ad valorem.

THE STATUTES

Schedule 6, part 3, subpart F, TSUS

Articles not specially provided for of a type used for household, table, or kitchen use; * * * all the foregoing and parts thereof, of metal:

* * * * * * *

Classified under:

653.75 Coated or plated with gold 20%

Claimed under:

653.80 Coated or plated with silver 8.5%

General interpretative rules:

10(c) An imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

* * * * * * *

(ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading;

10(d) If two or more tariff descriptions are equally applicable to an article, such article shall be subject to duty under the description for which the original statutory rate is highest, and, should the highest original statutory rate be applicable to two or more of such descriptions, the article shall be subject to duty under that one of such descriptions which first appears in the schedules; * * *

QUESTION PRESENTED

The question to be decided is whether the imported goblets are classifiable as articles coated or plated with gold or as articles coated or plated with silver.

THE FACTS

The goblets in question are 6½ inches in height, have a bowl diameter of 4 inches, and are silver in color save for the interior of the bowl which

is gold in color. Each base goblet was formed out of an alloy that was then plated with nickel over the entire surface. The entire surface of the base goblet was then coated or plated with silver following which the inside of the bowl was coated or plated with gold.

The thickness of the gold layer averages 0.72 millionths of an inch, while the thickness of the silver layer averages 0.99 millionths of an inch. The weight of the gold layer is approximately 8 millionths of a pound, while the weight of the silver layer is approximately 17 millionths of a pound so that the silver weighs about twice as much as the gold. The total surface area of the gold layer is 16 square inches, while the total surface of the silver layer amounts to approximately 45 square inches. Hence, the goblet contains almost three times as much silver area as gold area. However, based on the average price of gold and silver in the United States in 1973, the gold portion of the goblet was worth 10 times as much as the silver portion.

In 1957, the Federal Trade Commission adopted a regulation prescribing trade practice rules governing the sales or offers for sale of jewelry articles. This regulation reads as follows (16 CFR 23.22):

> § *23.22 Misrepresentation as to gold content*
>
> (a) It is an unfair trade practice to sell or offer for sale any industry product under any trade or product name or designation or other representation having the capacity and tendency or effect of deceiving purchasers or prospective purchasers thereof as to the presence of gold or gold alloy in the product, or as to the quantity or fineness of gold alloy, contained in the product, or as to the fineness, thickness, weight ratio, or manner of application of any gold or gold alloy plating, covering, or coating on any surface of any industry product or part thereof.
>
> (b) The following practices are among those to be regarded as inhibited by paragraph (a) of this section:
>
> * * * * * * *
>
> (5) Use of the term "gold electroplate," or "gold electroplated," as descriptive of any industry product or part thereof, unless such product or part is plated or coated with gold or a gold alloy and such plating or coating is of such karat fineness, thickness, and extent of surface coverage that the use of the term will not have the capacity and tendency of deceiving purchasers or prospective purchasers.
>
> * * * * * * *
>
> (c) Markings and descriptions of industry products or parts thereof will be considered as meeting the requirements of this section when in conformity with the following:
>
> * * * * * * *
>
> (3) An industry product or part thereof, all significant surfaces on which there has been affixed by an electrolytic process a coating or plating of gold, or of a gold alloy of not less than 10 carat fineness, the minimum thickness throughout of which is

equivalent to 7 millionths of an inch of fine gold, may be marked or described as "gold electroplate" or "gold electroplated." When the coating or plating meets the minimum fineness, but not the minimum thickness, above specified, the marking or description may be "gold flashed " or "gold washed," * * *

With respect to the goblets here in issue, the thickness of the gold surface of the interior of the bowl, as noted before, is only 0.72 millionths of an inch and therefore is only 10 percent of the minimum 7 millionths of an inch thickness required by the FTC regulation before an article may be represented as "gold electroplate" or "gold electroplated." Because the thickness of the gold covering is only 0.72 millionths of an inch, the imported goblets may not under this FTC rule be represented to the public as "gold electroplated" but may be represented as "gold flashed" or "gold washed." In that circumstance, goblets such as those involved here were represented in 1973 by plaintiff for sale to the public as "silver plated toasting goblets * * * with gold color lining." Competitors of plaintiff advertised similar goblets variously as "toasting goblets * * * gold lined"; "toasting goblets * * * gilt lined";[1] or "silver goblets with gold flashed bowls."

In correspondence between plaintiff and its supplier in Spain during the period 1969–71, the imported goblets were consistently referred to as "gold plated." Also plaintiff's own inventory list described the importations as "champagne goblet goldplated interior." In addition, the goblets were referred to as "gold plated" by concerns engaged in electroplating them.

Opinion

With these facts in mind, there is no question that the imported goblets are coated or plated with gold within the common meaning of item 653.75. Indeed, the sole criterion used by our appellate court in determining whether an article is classifiable under a tariff provision requiring the article to be "plated with gold" was whether the article, in fact, contained a gold plating and whether the gold plating was more than an "insignificant" or "negligible" portion of the article. *Saji & Kariya Co.* v. *United States*, 9 Ct. Cust. Appls. 78, T.D. 37945 (1919); *United States* v. *N. Shure Co.*, 21 CCPA 296, T.D. 46818 (1933); *Tuska* v. *United States*, 5 Ct. Cust. Appls. 506, T.D. 35153 (1915). And in the present case, there is no dispute that the imported goblet was coated or plated with gold on the inside of the bowl and that this gold plating was more than insignificant or negligible.

Plaintiff argues, however, that the term "coated or plated with gold" has had by reason of adoption of a Federal Trade Commission

[1] Webster's Third International Dictionary (1963 ed.) defines the adjective "gilt" as "covered with gold or gilt." The noun "gilt" in turn is defined in Webster's as "gold, or that which resembles gold, laid on the surface of a thing."

regulation in 1957 a commercial designation different from its common meaning which precludes the articles here in issue from being classified as gold coated or plated.[2] Put otherwise, plaintiff's claim is (1) that the effect of the 1957 FTC regulation was to establish a commercial designation for gold coated or plated articles which prescribes a minimum thickness requirement that must be met before an article may be represented as gold coated or plated; and (2) that since the articles here in issue did not contain this minimum thickness, the articles are not classifiable as gold coated or plated.

It is, of course, basic that the common and commercial meaning of tariff terms are presumed to be the same and the party who asserts that a tariff term has a meaning in the trade and commerce of the United States which is different from its common meaning has the burden of proof. This rule of commercial designation "was intended to apply to cases where the trade designation is so universal and well understood that the Congress and all the trade are supposed to have been fully acquainted with the practice at the time the law was enacted." *Jas. Akeroyd & Co.* v. *United States*, 15 Ct. Cust. Appls. 440, 443, T.D. 42641 (1928). Thus, "(c)ommercial designation must be the result of established usage in commerce and trade and must be definite, uniform, and general, and not local, partial, or personal. * * * Before the plain understanding of a term can be deviated from, it must be shown by plenary proof to have a different import in trade and commerce which is fully and completely understood and accepted throughout the United States by all those dealing wholesale in that class of goods. * * *." Sturm, *A Manual of Customs Law* (1974), page 210.

In this setting, the court concludes for the reasons that follow that plaintiff's reliance on the FTC regulation is misplaced, and that in any event plaintiff failed to prove a commercial designation that would preclude classification under item 653.75.

First, there is no indication anywhere in the legislative history of the TSUS, in general, or item 653.75 and its superior heading, in particular, which would disclose that Congress intended that the FTC regulation would be determinative of the scope of any provision in the TSUS. See, e.g., *A. N. Deringer, Inc.* v. *United States*, 63 CCPA 37, 42, C.A.D. 1161, 524 F. 2d 1215, 1220 (1975).

Second, the TSUS does not distinguish between "coated or plated with gold" and "coated or plated with silver" (items 653.75 and 653.80) except for the precious metal utilized. The FTC regulation,

[2] A descriptive term, as well as an eo nomine designation, in a tariff act is susceptible of proof of commercial designation unless it was the intent of Congress to restrict the meaning of the term used to its common meaning. *La Manna, Azema & Farnan* v. *United States*, 14 Ct. Cust. Appls. 289, 292, T.D. 41908 (1926); *American Express Co.* v. *United States*, 10 Ct. Cust. Appls. 275, 279, T.D. 38680 (1920); *United States* v. *Iwai & Co., Ltd.*, 29 CCPA 60, 62, C.A.D. 171 (1941).

on the other hand, distinguishes between silver plated articles and gold plated articles by prescribing a thickness requirement for gold plating and not prescribing a thickness requirement for silver plating. Clearly, Congress did not adopt the FTC provision regarding plating since the TSUS contains no thickness requirements for either gold or silver.

What is more, the fact that under the FTC regulation certain requirements must be met before articles may be offered as gold plated does not ipso facto establish a commercial designation for the terms gold coating or plating. Proof must still be presented by plaintiff to show that such requirements were fully and completely understood and accepted by all those dealing in wholesale in that class of goods and that such requirements were definite, uniform, and general. Plaintiff, however, has failed to satisfy its burden in this respect.

For one thing, the record is clear that the change mandated by the FTC regulation did not become definite, uniform, and general in the trade. For example, in the period immediately antedating the importations at issue, plaintiff itself and its foreign supplier consistently referred to the imported goblets as "gold plated." Also, the trade advertised goblets similar to those involved here as "silver goblets with gold flashed bowls" or as "toasting goblets * * * gilt lined"—and these are simply other ways of referring to the articles as coated with gold. Further, electroplaters within the trade have consistently referred to articles such as the ones involved here as "gold plated." Thus, in the last analysis, plaintiff has failed to prove a uniform and recognized commercial designation that precludes classification such as the importations at bar from the status of "coated or plated with gold."

Plaintiff next argues that the rule of "relative specificity," contained in General Interpretative Rule 10(c), controls the competition between item 653.75 (which covers articles coated or plated with gold), and item 653.80 (which covers articles coated or plated with silver), and that item 653.80 is more specific. However, for the reasons set out below, it is concluded that both provisions are equally specific and that General Interpretative Rule 10(d) therefore applies.

Under the rule of "relative specificity" of tariff provisions as contained in General Interpretative Rule 10(c), where there is competition between two or more tariff provisions for classification of a particular article, and both tariff provisions encompass that article, it is the provision whose requirements are more difficult to fulfill which controls classification. See *Humphreys* v. *United States*, 56 CCPA 67, 69, 71, C.A.D. 956, 407 F. 2d 417, 419, 420 (1969).

Clearly, the particular terms of the tariff provisions in issue are measured for relative specificity rather than the composition of the merchandise in issue. With this basic rule in mind, examination of

the two provisions involved (items 653.75 and 653.80) discloses that they are identical except for the particular precious metal used as the plating material. Therefore, it is apparent that General Interpretative Rule 10(c) does not resolve the classification issue since the requirements of both items 653.75 and 653.80 are equally difficult to fulfill.

Accordingly, General Interpretative Rule 10(d) controls for the reason that items 653.75 and 653.80, TSUS, are "equally applicable" to the imported goblets inasmuch as the goblets are "coated or plated" with both gold and silver.

In this circumstance, General Interpretative Rule 10(d) mandates classification under the provisions which contain the highest original statutory rate of duty (the col. 2 rate). And since item 653.75 applies the highest original statutory rate of duty (65 percent versus 50 percent for item 653.80), General Interpretative Rule 10(d) requires classification under item 653.75.

For the foregoing reasons, the classification under item 653.75 is affirmed and the action is hereby dismissed.

(C.D. 4848)

ARMSTRONG BROS. TOOL CO.; BERGMAN TOOL MANUFACTURING CO., INC.; DURO METAL PRODUCTS COMPANY; MILWAUKEE TOOL & EQUIPMENT CO., INC.; PROTO TOOLS DIVISION, INGERSOLL RAND COMPANY; WARREN TOOL CORPORATION; WILSON TOOL DIVISION OF WILTON CORPORATION; AND WOODINGS-VERONA TOOL WORKS, PLAINTIFFS *v.* UNITED STATES (GREAT NECK SAW MANUFACTURING, INCORPORATED, PARTY-IN-INTEREST), DEFENDANT

On Plaintiffs' Motion and Government's Cross-Motion for Summary Judgment

Court No. 77-8-02004

[Plaintiffs' motion denied; Government's cross-motion granted.]

(Dated March 27, 1980)

Frederick L. Ikenson, Esq., for the plaintiffs.

Alice Daniel, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *Sidney N. Weiss*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge:

INTRODUCTION

This is an American manufacturers' action brought pursuant to 28 U.S.C. 1582(b) (1976), 28 U.S.C. 2632(a) (1976), and 19 U.S.C.

1516(c) (1976), involving the Antidumping Act of 1921, as amended (19 U.S.C. 160, et seq. (1970)) (Antidumping Act).

Plaintiffs, domestic manufacturers, and/or wholesalers of certain nonpowered handtools (viz, chisels, punches, hammers and sledges, vises, C-clamps, and battery service tools), contest the negative injury determination of the U.S. International Trade Commission (Commission) in investigation No. AA1921–149 (40 F.R. 57517 (1975)) and the action of the Department of the Treasury (Treasury) in amending its determination of sales at less than fair value (LTFV) (40 F.R. 49111 (1975)). Great Neck Saw Manufacturing, Inc., made a party in interest pursuant to 19 U.S.C. 1516(c) (1976),[1] is the consignee in New York Seaport entry No. 77–471887 of July 20, 1977, and the importer of handtools falling within the class or kind of merchandise involved in this action imported without assessment of antidumping duties.

This action is presently before me on plaintiffs' motion and the Government's cross-motion for summary judgment. After careful consideration of the voluminous administrative record and the comprehensive memoranda of law submitted by counsel, I have concluded that no genuine triable issue of fact is presented in this case, and that defendant is entitled to summary judgment dismissing this action.

BACKGROUND

The highlights of the administrative history of this action are undisputed, and may be briefly summarized:

1. On September 5, 1974, an antidumping proceeding notice issued by Treasury was published in the Federal Register (39 F.R. 32159), advising that an investigation was being instituted to determine whether certain nonpowered handtools from Japan, including chisels, punches, hammers and sledges, vises, C-clamps, and battery service tools, were being or were likely to be sold at LTFV.

2. On June 5, 1975, a withholding of appraisement notice was issued by Treasury and published in the Federal Register (40 F.R. 24218). Included among the handtools covered were chisels, punches, hammers and sledges (with or without handles), vises, C-clamps, and battery service tools, other than specific hand and battery service tools, from certain Japanese sources. In the notice, battery service tools were stated to include "battery terminal lifters, battery post and terminal cleaning brushes, battery terminal spreaders, angle-nose pliers, booster cables, and battery service kits (terminal puller, cleaning brush, and two terminals)."

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[1] Under 19 U.S.C. 1516(f) (1976), the consignee or his agent has the right to appear and be heard as a party in interest in an action brought by an American manufacturer pursuant to sec. 1516. In the present case, however, the party in interest, Great Neck Saw Manufacturing, Inc., did not file any papers in connection with the present cross-motions.

3. On September 5, 1975, a determination of sales at LTFV covering "Certain Nonpowered Handtools from Japan" was issued by Treasury and published in the Federal Register (40 F.R. 41155). Included among the handtools covered were chisels, punches, hammers and sledges (with or without handles), vises, C-clamps, and battery service tools, other than specific hand and battery service tools, from certain Japanese sources. The term "battery service tools," was defined in the same manner as it was in the withholding of appraisement notice.

4. Thereafter, on September 10, 1975, the Commission instituted investigation No. AA1921–149 for the purpose of determining whether an industry in the United States was being or was likely to be injured, or prevented from being established, by reason of sales at LTFV. On September 15, 1975, the Commission published in the Federal Register its notice of investigation and public hearing (to be held on October 2, 1975) and included in such notice the same definition of battery service tools used by Treasury in its withholding of appraisement notice and its determination of sales at LTFV (40 F.R. 42607). A notice rescheduling the hearing from October 2 to October 22, 1975, was published by the Commission in the Federal Register on September 24, 1975 (40 F.R. 43956). The hearing was held on October 22 and 23, 1975.

5. On October 21, 1975, Treasury published in the Federal Register an amendment of determination of sales at LTFV by eliminating from the scope of its original determination all battery service tools other than battery terminal lifters (40 F.R. 49111).

6. The Commission, on October 23, 1975 (second day of the hearing), amended the scope of its investigation to make it correspond with the new advice received from Treasury, and on October 29, 1975, published in the Federal Register notice of the amendment of the investigation (40 F.R. 50320).

7. The Commission unanimously reached a negative decision (viz, it determined that an industry in the United States is not being or is not likely to be injured, or is not prevented from being established, by reason of the sales at LTFV). The decision together with a statement of reasons was published in the Federal Register on December 10, 1975 (40 F.R. 57517). In arriving at its determination, the Commission gave due consideration to written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission's staff from questionnaires, personal interviews, and other sources.

No question has been raised concerning plaintiffs' compliance with the administrative prerequisites to the initiation of a civil action prescribed by 19 U.S.C. 1516 (a) and (c).

Pursuant to plaintiffs' motion and over defendant's objection, I entered an order that the Secretary of the Commission prepare and transmit to the clerk of the court, on or before September 25, 1978, the following: (1) A certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation No. AA1921–149; (2) certified copies of all written submissions, questionnaires, reports, and all other documents relating to investigation No. AA1921–149; and (3) all other things in the files of the Commission relating to the investigation.[2]

Pursuant to the foregoing order, as modified, the Secretary of the Commission transmitted what are represented to be all of the documents and things enumerated and described above that were locatable,[3] with the exception of the one document which was claimed by the Commission Chairman to be privileged.[4]

STATUTES INVOLVED

The statutory provisions relevant to this action are:

Section 201, Antidumping Act of 1921, as amended, 19 U.S.C. 160 (1970):

> *Initiation of investigation; injury determination; findings; withholding appraisement; publication in Federal Register.*
>
> (a) Whenever the Secretary of the Treasury (hereinafter called the Secretary) determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the U.S. Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in secs. 160 to 171 of this title called a finding) of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's

[2] This was an unpublished order entered on July 26, 1978. In a similar published order entered in a companion case, it was stated that the order was to enable the court to determine whether the Commission's finding of injury was "among other things, arbitrary, an abuse of discretion, or otherwise contrary to law." *Armstrong Bros. Tool Co. et al. v. United States, etc.*, 80 Cust. Ct. 252, C.R.D. 78–5 (1978). The July 26, 1978, order in the instant case was modified by a stipulation for a protective order entered on Aug. 28, 1978.

[3] These documents and things, comprising the massive administrative record, are listed on two numbered indexes, which were also transmitted to the court, entitled "List No. 1 Public Documents Transmitted to the United States Customs Court," and "List No. 2, Confidential Documents Transmitted to the United States Customs Court." Public documents are identified on list No. 1, while those documents which the Commission treated as containing confidential business information and which are subject to the terms of of the stipulation for protective order are identified on list No. 2.

[4] This claim of privilege was sustained by the court in an unpublished order entered on Dec. 29, 1978.

330-630 O - 81 - 8

finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Sectetary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the U.S. Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative.

Section 202(a), Antidumping Act of 1921, as amended, 19 U.S.C. 161(a) (1970):

Amount of duty to be collected; determination of foreign market value of goods.

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

Section 516, Tariff Act of 1930, as amended, 19 U.S.C. 1516 (1976):

Petitions by American manufacturers, producers, or wholesalers.

(a) Classification, rate of duty, countervailing duty, and antidumping duty furnished upon request; petition; contents.

The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as countervailing duties), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as antidumping duties), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper, and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties or antidumping duties should be assessed.

(b) Determination of petition; notification to petitioner; procedures for countervailing duties and antidumping duties.

If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than 30 days after the date such notice to the petitioner is published in the weekly CUSTOMS BULLETIN shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

(c) Determination of correctness of initial appraised value, classification, rate of duty, or nonassessment of countervailing duties or antidumping duties; contest by petitioner; procedure.

If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than 30 days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchan-

dise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure to assess countervailing duties or antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

(d) Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid.

Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the U.S. Customs Court contesting such determination.

(e) Appraisal, classification, and liquidation of entries of merchandise covered by published decisions of the Secretary.

Notwithstanding the filing of an action pursuant to section 2632 of title 28, merchandise of the character covered by the published decision of the Secretary (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the U.S. Customs Court or of the U.S. Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(f) Consignee or his agent as party in interest before the Customs Court.

The consignee or his agent shall have the right to appear and to be heard as a party in interest before the U.S. Customs Court.

(g) Appraisement, classification, and assessment of duty of merchandise covered by published decision of the Secretary in accordance with final judicial decision of Customs Court or Court of Customs and Patent Appeals sustaining cause of action in whole or in part; suspension of liquidation of entries

If the cause of action is sustained in whole or in part by a decision of the U.S. Customs Court or of the U.S. Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

(h) Regulations implementing required procedures.

Regulations shall be prescribed by the Secretary to implement the procedures required under this section.

PLAINTIFFS' CONTENTION

Plaintiffs contend that Treasury's amendment of its determination of sales at LTFV so as to exclude from the term "battery service tools" all tools other than battery terminal lifters after transmittal of the investigation to the Commission was ultra vires. Further, plaintiffs claim that the Commission erred as a matter of law by eliminating from the class or kind of merchandise under investigation all battery service tools other than battery terminal lifters; and that the Commission's negative determination is arbitrary, capricious, and not supported by substantial evidence. Hence, plaintiffs seek an order setting aside the Commission's negative injury determination and directing Treasury to publish a finding of dumping with the result that antidumping duties will be assessed, where appropriate, on entries of the subject hand tools from Japan.

GOVERNMENT'S CONTENTION

The Government contends that the court is limited to a review of the Commission's statement of reasons in deciding whether the Commission's determination is arbitrary, capricious, or otherwise contrary to law. Relying upon the foregoing scope and standard of review, defendant urges that the Commission, in its statement of reasons, applied proper legal criteria and considered appropriate indicia of injury, and therefore its determination is not arbitrary, capricious, or otherwise contrary to law. Moreover, defendant maintains that in any event, the Commission's determination is supported by the admini-

strative record, as transmitted to the court. Finally, defendant insists that Treasury acted lawfully in amending its LTFV determination.

ISSUES PRESENTED

1. Whether the Commission's negative injury determination is arbitrary, capricious, or otherwise contrary to law.

2. Whether Treasury's amendment of its LTFV determination after transmittal to the Commission of the antidumping investigation was ultra vires.

OPINION

I

For the scope and standard of review applicable to the Commission's injury determinations see my recent opinion in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 84 Cust. Ct. 16, C.D. 4838 (1980), *appeal pending* (*Armstrong I*), and cases cited therein. See also *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 84 Cust. Ct. 227, C.R.D. 80–2 (1980). In the present case, following the rationale of *Armstrong I*, I have carefully reviewed the entire administrative record transmitted to the court, and do not find the Commission's determination to be arbitrary, capricious, or otherwise contrary to law, as claimed by plaintiffs. Moreover, I am unable to agree with plaintiffs' contention that the Commission's determination is not supported by substantial evidence.

In *Armstrong I*, I emphasized the intent of Congress to provide the Commission with a wide latitude within which to determine the existence or nonexistence of injury under the Antidumping Act, and discussed the indicia of injury generally considered by the Commission in its investigations. From the Commission's statement of reasons in the instant case, it is evident that the Commission considered and carefully analyzed a number of pertinent economic and financial factors, including domestic industry shipments, exports, profits, prices, unfilled orders, and other relevant factors. Thus, in its statement of reasons, the Commission found:

First:

> *U.S. industry.*—The U.S. industry most likely to be adversely affected by imports sold at LTFV consists of the facilities in the United States devoted to the production of chisels, punches, hammers and sledges (with or without handles), vises, C-clamps, and battery terminal lifters. These articles are produced at plants located throughout the United States, and are sold primarily to industrial-commercial distributors, hardware wholesalers and cooperatives, automotive-service-market wholesalers, and several mass-merchandise retail chains.

Second: The markets in the United States for the domestic tools and the Japanese tools are different. On this aspect,the Commission found:

> *The imported articles.*—The tools imported from Japan are generally limited to the hardware wholesale and mass-merchandise retail markets. The evidence developed during the investigation indicates that imports, overall, are of somewhat lower quality and sell at commensurately lower prices, making such imports generally more suitable for sale in retail outlets primarily serving the occasional user. By contrast, the tools produced by domestic manufacturers are sold primarily for use in industry, by professional tradespeople, and by skilled craftsmen.

Third: The Commission found that the market penetration by the imports which occurred did not result from LTFV sales:

> *Import penetration and lost sales.*—Import market penetration remained at about 6 percent during 1972–74, a period which includes Treasury's investigation, April 1–September 30, 1974. Although imports from Japan increased more rapidly in the first 8 months of 1975 than in the preceding 3 years, *the increase can be largely attributed to imports of vises which were the result of orders placed in Japan because of the inability of the domestic producers to meet increased demand on time.* [Italic added.]

Fourth: The Commission could find no substantiation for the domestic industries' allegations of lost sales. Any lost sales were attributable to factors other than LTFV sales:

> It was established during the investigation that some domestic distributors of the tools under consideration have either turned to Japanese imports or increased such imports because of the difficulties experienced by domestic producers in making shipments during recent raw materials shortages. Other alleged losses of sales by domestic producers to imports were not substantiated; the firms involved have, in fact, been importing or purchasing imported Japanese tools for more than a decade and have not significantly increased such purchases during the period of the investigation. Several distributors indicated that their reason for accepting imported tools was to widen the selection to their dealers in terms of range of quality and price. The Commission could not corroborate allegations that the domestic industry had lost sales of the subject articles because of LTFV sales of certain Japanese imports.

Fifth: Despite the LTFV import sales, domestic shipments and exports of the handtools under consideration rose in line with increased domestic demand in the period investigated (1971–74), and exports of such tools by domestic producers increased during the same period. This increase in demand for domestic tools resulted in higher unfilled orders during 1972–74, reflecting the domestic producers' difficulty in meeting the increased demand. The decline of U.S.

shipments and exports in the first 8 months of 1975 was attributable to factors unrelated to the LTFV imports:

> The decline in U.S. shipments in the first 8 months of 1975 slightly exceeded the decline in apparent domestic consumption, reflecting the greater sensitivity of the generally higher quality, higher priced domestic tools to the reduced industrial activity in the United States. The decline in exports in the first 8 months of 1975 appears to reflect the economic recession in industrial countries abroad.

Sixth: When the effect of LTFV sales on prices was investigated, the Commission found no evidence of price suppression or depression, and the data obtained in the investigation showed that prices for domestic and imported tools increased consistently for several years.

Seventh: It was further found that profitability and employment were not adversely affected by the LTFV sales:

> *Profitability and employment.*—The financial data of the domestic industry, as reported to the Commission, indicate increased net sales of chisels, punches, hammers, sledges, vises, and C-clamps during 1972–74. The ratio of net operating profit to net sales of these tools remained at about 9 percent in 1972 and 1973. The rise in production costs during 1974 occurred faster than the domestic producers could raise their prices, creating a temporary decline in profits during that period. However, this situation reversed during 1975, when the profits were higher than in previous years.
>
> Employment and man-hours in the domestic industry increased throughout the period 1971–74. Although employment declined slightly in the first 8 months of 1975, total man-hours worked continued to increase.

Finally: The Commission found no likelihood of injury:

> *No likelihood of injury.*—The evidence obtained for the period of the investigation also indicates that there is no likelihood of injury to the domestic industry within the meaning of the Antidumping Act, 1921, as amended. In 1974, U.S. shipments increased at a greater rate than imports from Japan. With the exception of vises, imports of the tools under consideration declined in the first 8 months of 1975. It is reasonable to expect that U.S. shipments will increase with improvement in overall economic activity. The latest data on the profitability of the domestic industry show no evidence of future injury.

From the economic and financial criteria applied and the facts and circumstances delineated in the Commission's statement of reasons, the Commission adequately demonstrated that the domestic industry was neither injured nor was likely to be injured by reason of the LTFV imports. There is no indication that an incorrect legal standard or any unreasonable criteria of injury were utilized. Thus, from the Com-

mission's statement of reasons I am not persuaded that the determination was arbitrary and capricious, as claimed by plaintiffs.

Indeed, plaintiffs do not contend that the criteria of injury employed by the Commission were arbitrary and capricious. Rather, plaintiffs maintain that "(i)t was erroneous as a matter of law for the Commission not to have reached an affirmative injury determination in light of the severe margins of dumping, the consequential unfair competitive advantage enjoyed by the LTFV imports, and the significant levels of market penetration, particularly when said penetration was accomplished through the competitive leverage created via the LTFV pricing and was accompanied by severe market disruptions." (Memorandum, at 14.) These "market disruptions," plaintiffs argue, are supported by evidence in the record of high and rising market penetration of the imported tools which caused serious declines in domestic industry profits, lost sales, price suppression, sharp declines in domestic production and shipments, and sharp curtailment in investment in industrial capacity. Plaintiffs further urge that the record shows that the sales of the LTFV Japanese handtools have precluded the entry of certain domestic producers into the low-quality, low-price handtools market. Last, plaintiffs characterize the Commission's finding of a lack of competition between the LTFV imports and the domestically produced handtools as one of the critical deficiencies in the Commission's decision. In short, plaintiffs insist that had the Commission concluded that the LTFV imports competed directly with the domestic handtools, it would have been obligated to find, as a matter of law, that an industry in the United States was being or was likely to be injured.

It is evident that plaintiffs' arguments essentially challenge discretionary findings by the Commission. Fundamentally, it is not the function of the court in reviewing an injury determination of the Commission under the Antidumping Act to weigh the evidence or substitute its judgment for that of the Commission. *City Lumber Co. et al.* v. *United States*, 59 CCPA 89, C.A.D. 1045, 457 F. 2d 991 (1972); *Imbert Imports, Inc., et al.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973). Moreover, since the Commission based its determination on a consideration of appropriate indicia of injury, absent any clear error of judgment (and I find none), the Commission's determination cannot be regarded as arbitrary or capricious. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.* 419 U.S. 281, 285 (1974), *reh. denied*, 420 U.S. 956 (1975); *Citizens to Preserve Overton Park, Inc., et al.* v. *Volpe, Secretary of Transportation, et al.*, 401 U.S. 402, 416 (1971).

Addressing the question of the scope and extent of judicial power to set aside the ruling of an administrative agency, the Court of Appeals made this relevant observation in *Deutsch* v. *United States Atomic Energy Commission*, 401 F. 2d 404, 407 (C.A.D.C. 1968):

> We are urged to overrule the (Atomic Energy) Commission's holding that petitioner is not entitled to an award upon the ground that this conclusion is arbitrary and capricious and lacks substantial evidence in the record supporting or justifying this ruling. We were told, moreover, on oral argument that the factual basis for the Commission's holding is clearly and completely erroneous as a matter of scientific knowledge and phenomenon. The briefs and supporting documents filed by both parties are extensively devoted to presentation and argument as to the correctness, or the falsity of scientific principles related to radioactive material and products, atomic energy, irradiation, and the nucleus of the atom, and the action and reaction of its protons and neutrons. We are therefore confronted at the very threshold of this case with the ever-recurring question of the scope and extent of our authority to set aside the ruling of an administrative agency. Despite our daily diet of challenges to administrative agency action and our resulting repeated efforts to articulate the limits of judicial review of such actions we nevertheless are continually called upon to substitute our judgment on factual issues for that of the agency charged by Congress with the initial responsibility of making, evaluating, and acting upon those facts. *It is well settled that the factfinding function is within the exclusive province of the administrative agency.* We appear unable to establish a substantial recognition at the bar that "*[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.*" *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, at 146, 59 S. Ct. 754, at 765, 83 L. Ed. 1147 (1939). [Italic added; footnote omitted.]

See also the recent opinion of Judge Maletz in *Pasco Terminals, Inc.* v. *United States*, 83 Cust. Ct. 65, C.D. 4823, 477 F. Supp. 201 (1979), *appeal pending*, wherein the court addressed the discretionary authority of the Commission in injury determinations under the Antidumping Act and the applicable standard of judicial review.

In light of the above-cited authorities, it would be impermissible for me to substitute my judgment for that of the Commission or to reweigh the evidence as to specific factual findings. After a careful and searching review of the administrative record, I hold that the findings of the Commission discussed above have a rational basis in fact and are supported by substantial evidence.

That plaintiffs might be able to draw conclusions from the record inconsistent with those reached by the Commission does not mean that the Commission's determination is not supported by "substantial evidence." As observed by the Supreme Court in *Consolo* v. *Federal Maritime Commission et al.*, 383 U.S. 607, 620 (1966):

> * * * the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F. 2d 18, 21.

It is emphasized that in deciding whether the Commission's determination meets the substantial evidence test, the court does not solely consider the transcript of the public hearing and the public documents received by the Commission. The record before the Commission (and now before the court) comprises a number of confidential documents, the content of which may not now be divulged or discussed in this opinion. Nevertheless, the defendant has submitted an "accounting" of the evidence in the record supporting each of the factual findings of the Commission, and it suffices to state that I find the Commission's determination is clearly supported by substantial evidence.[5]

To buttress their contentions, plaintiffs have cited certain prior affirmative injury determinations by the Commission as "precedents." However, plaintiffs have failed to demonstrate that all the facts found by the Commission in the present case are identical with those found in the prior investigations cited. Defendant, on the other hand, has shown that this case is not factually identical with the prior investigations cited by plaintiffs. As stressed in *Armstrong I*, each injury investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation. Thus, as concluded in *Armstrong I*, injury investigations are properly decided by the Commission on a case-by-case basis.[6]

In summary, I find that the Commission applied the proper legal standards and considered appropriate economic and financial criteria in making its negative determination; and that its determination is supported by the administrative record. Accordingly, I must reject plaintiffs' claim that the Commission's determination is arbitrary, capricious, and not supported by substantial evidence.

II

Under the Antidumping Act of 1921, as amended, Treasury has the responsibility to determine whether a class or kind of foreign merchandise is being or is likely to be sold in the United States at LTFV. If Treasury determines that there are LTFV sales of a class or kind of foreign merchandise, Treasury must so advise the International Trade

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[5] This is not meant to imply that the Commission's determination must meet the "substantial evidence" test.

[6] Defendant concedes that this case-by-case approach does not carry with it a grant of carte blanche or authority to decide cases in an arbitrary or capricious manner.

Commission, which then undertakes an investigation to determine whether a domestic industry is being injured or is likely to be injured, or is prevented from being established, by reason of such sales at LTFV. 19 U.S.C. 160(a).

We now consider whether Treasury's amended determination of sales at LTFV of October 21, 1975, was ultra vires because the antidumping investigation had already been transmitted to the Commission, and the Commission had already instituted its injury investigation.

Plaintiffs claim that after transmittal of the antidumping investigation to the Commission, Treasury had no further authority to act in the matter of determining the existence of sales at LTFV, and that the Commission acted unlawfully in narrowing the scope of its injury investigation to conform to Treasury's amended determination of sales at LTFV. Consequently, according to plaintiffs, the final injury determination was insufficient as a matter of law in that it failed to cover battery service tools other than battery terminal lifters.

As we have seen, the term "battery service tools," as used initially by Treasury and the Commission, included battery terminal lifters, battery post and terminal cleaning brushes, battery terminal spreaders, angle-nose pliers, booster cables, and battery service kits (terminal puller, cleaning brush, and two terminals). 40 F.R. 24218, 41155, and 42607. However, after the Commission had commenced its investigation, Treasury amended its affirmative LTFV determination to exclude all battery service tools except battery terminal lifters (40 F.R. 49111); and subsequently the Commission amended the scope of its injury investigation in conformity with Treasury's amended LTFV determination, by excluding the battery service tools, other than battery terminal lifters (40 F.R. 50320).

The reasons for Treasury's amendment of its LTFV determination are set forth in a memorandum dated November 10, 1975, from Peter O. Suchman to David R. Macdonald (attached to defendant's memorandum as exhibit 1). From the Suchman memorandum the following facts appear:[7]

The "battery service tools" encompassed within Treasury's original LTFV determination comprised six different types of tools: Battery terminal lifters, battery service kits (terminal puller, cleaning brush, and two terminals), battery post and terminal cleaning brushes, battery terminal spreaders, angle-nose pliers, and booster cables. Due to the insignificant volume of trade involved in "battery service tools" relative to the total volume of handtools covered by the in-

[7] This memorandum was furnished by defendant to plaintiffs pursuant to their discovery, with the last paragraph deleted on the ground of privilege. This claim of privilege was sustained by the court in an order entered on Mar. 27, 1979. *Armstrong Bros. Tool Co. et al.* v. *United States*, 82 Cust. Ct. 344, C.R.D. 79-8 (1979). Plaintiffs do not dispute the correctness of the factual matters set forth in the memorandum.

vestigation, battery service tools were treated as a single class or kind of merchandise. Since a substantial margin of dumping was found on terminal lifters, an affirmative determination of sales at LTFV was issued on "battery service tools." However, no dumping margins were found on battery service kits, brushes, terminal spreaders, or angle-nose pliers, and no information was received on booster cables.

It further appears from the Suchman memorandum that after the Commission received the investigation from Treasury, the Commission informed Treasury that the absence of any margin information on five of the six categories of battery service tools "posed serious problems," and that each of the tools within the battery service tools category should be considered individually since they are not competitive with one another. Treasury then decided that it was inappropriate to consider all the battery service tools together as a single class of merchandise, and treated each of the battery service tools separately. When considered individually, Treasury concluded that its original affirmative LTFV determination covering the battery service tools was improper inasmuch as five of the six tools (viz, all tools except the battery terminal lifters) "showed no margins."

Against this factual background, I am not persuaded that Treasury's action in amending its LTFV determination was ultra vires, as claimed by plaintiffs. I agree with defendant that Treasury's amendment is clearly authorized by section 153.42 (in 1975, sec. 153.39) of the Customs Regulations promulgated under the authority of 19 U.S.C. 173. Section 173 authorizes Treasury to make rules and regulations necessary for the enforcement of the Antidumping Act.

Section 153.42 of the Customs Regulations reads:

> 153.42 *Revocation of determination of sales at less than fair value; determination of sales at not less than fair value.* [Sec. 153.39 in 1975]
>
> If the Secretary is persuaded from information submitted or arguments received that his determination of sales at less than fair value was in error, and if the U.S. International Trade Commission has not yet issued a determination relating to injury, he will publish a notice of "Revocation of Determination of Sales at Less Than Fair Value," or if appropriate, a notice of "Modification of Determination of Sales at Less Than Fair Value," which notice will set forth a description of the merchandise involved and state the reasons upon which it was based. The Secretary will notify the U.S. International Trade Commission of his action. [19 CFR 153.42.]

Fundamentally, duly authorized customs regulations have the force and effect of law. *Socony Vacuum Oil Co., Inc.* v. *United States*, 44 CCPA 83, C.A.D. 641 (1957); *Gallagher & Ascher* v. *United States*, 14 Ct. Cust. Appls. 38, T.D. 41548 (1926); *Plywood & Door Southern Corp.* v. *United States*, 57 Cust. Ct. 309, C.D. 2800 (1966). Plainly,

after becoming aware of the error in its original determination of sales at LTFV, Treasury had an obligation to observe its own regulation by making an appropriate modification of its original determination.

Plaintiffs' contention that Treasury's "second thoughts" on the matter of sales at LTFV respecting battery service tools were disruptive of the Commission's investigation (which was already in progress) is without merit. On that score, it need only be recalled that the impetus for the amendment came from the Commission's own staff which complained to Treasury that its original determination "posed serious problems" (Suchman memorandum).

Under all the facts and circumstances herein, I have concluded that Treasury's amendment of its determination of sales at LTFV was not ultra vires. In view of the foregoing conclusion, it follows that the Commission acted lawfully in limiting the scope of its injury investigation and determination to exclude battery service tools other than battery terminal lifters.

CONCLUSION

For the foregoing reasons: Plaintiffs' motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted; and the action is dismissed.

It will bear repetition for the court to express publicly its sincere appreciation to Mr. Frederick L. Ikenson, attorney for the plaintiffs, and to Messrs. David M. Cohen, Joseph I. Liebman and Sidney N. Weiss, counsel for the Government, for their professional skill and assistance in aiding the court.

(C.D. 4849)

NATIONAL SUGAR REFINING COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 77-10-04300

The date of exportation of merchandise imported from a foreign country to the United States is the time the merchandise actually leaves the country of exportation for the United States.

[Judgment for defendant.]

(Decided March 27, 1980)

Curtis, Mallet-Prevost, Colt & Mosle (*Robert* D. *Whoriskey* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Saul Davis* on the briefs), for the defendant.

BOE, Judge: The issue to which the court directs its attention herein has its genesis in the Presidential proclamations relating to the duties imposed on sugar imported into the United States under item 155.20, TSUS. On September 21, 1976, Presidential Proclamation 4463, modifying a prior proclamation, increased the duty on sugar imports. Subsequently on October 4, 1976, Presidential Proclamation 4466 was issued providing in part that the provisions of Presidential Proclamation 4463 "* * * shall not be effective with respect to articles exported to the United States before 12:01 a.m. (U.S. eastern daylight savings time), September 21, 1976, provided that such articles are entered, or withdrawn from warehouse, for consumption on or before November 8, 1976."

To the imposition of the increased duty provided by Presidential Proclamation 4463 on the sugar imported into the United States from the Dominican Republic and entered for consumption on October 22, 1976, the plaintiff filed a protest which was denied by the Customs Service. It is upon the motion for summary judgment filed by the plaintiff and the cross-motion for summary judgment filed by the defendant with respect thereto that this proceeding is now before the court.

The facts upon which plaintiff's motion is predicated are presented by an "affidavit" made by plaintiff's counsel alleging in material part: (1) That the sugar which plaintiff had contracted to purchase was fully laden on a charter vessel at the Port of Rio Haina, Dominican Republic, on September 20, 1976; (2) that local restrictions prohibited the charter vessel carrying the merchandise in question to sail from the port during night hours; (3) that the charter vessel bearing the merchandise in question departed the Port of Rio Haina and the country of the Dominican Republic, "clearing the harbor," at 7:30 a.m., local time, on September 21, 1976.

The defendant in its cross-motion contends that a genuine issue exists as to material facts alleged in plaintiff's motion, precluding judgment in favor of plaintiff's motion for summary judgment.[1]

Notwithstanding that the record clearly indicates that certain facts alleged by the plaintiff are in dispute, this court, however, is satisfied that no issue as to a material fact remains. Accordingly, a determination of the motion and cross-motion submitted by the respective parties is appropriate.

[1] Defendant further contends that plaintiff's motion for summary judgment is supported only by an affidavit made by plaintiff's counsel asserting facts concerning which the affiant had no personal knowledge and which, accordingly, is inadmissible in evidence. Defendant has, therefore, treated plaintiff's affidavit as a statement of material facts provided by the rules of this court.

It is undisputed that the vessel carrying the merchandise in question finally departed the port at which the sugar cargo was laden and the country of the Dominican Republic subsequent to 12:01 a.m. on September 21, 1976 (e.s.t.). The sole question presented for determination, therefore, is whether the merchandise in question, as contended by the plaintiff, was "exported to the United States before 12:01 a.m. * * * September 21, 1976," within the intendment of Presidential Proclamation 4466. It is the opinion of the court that the answer must be in the negative.

"Exportation" has been defined by the U.S. Supreme Court as "(1) a severance of goods from the mass of things belonging to (the country of exportation) with (2) an intention of uniting them to the mass of things belonging to some foreign country." *Swan & Finch Co.* v. *United States*, 190 U.S. 143, 145 (1903). Both the element of severance as well as the element of intent must not only exist but coincide in order to constitute an act of exportation. *Moore Dry Goods Co.* v. *United States*, 11 Ct. Cust. App. 449, T.D. 39531 (1923); *United States* v. *National Sugar Refining Co.*, 39 CCPA 96, C.A.D. 470 (1951); *Nassau Distributing Co.* v. *United States*, 29 Cust. Ct. 151, C.D. 1459 (1952).

The "severance of goods from the mass of things belonging to (the country of exportation)" has been construed by our appellate court as meaning that the goods in question have been physically carried out of the country of exportation. See, e.g., *National Sugar Refining Co.*, 39 CCPA at 101.

In the construction of our Customs laws, the decisions of all courts have uniformly held that the date of exportation is that time at which the goods in question finally depart the country of exportation. *Roessler & Hasslacher Chemical Co.* v. *United States*, 1 Ct. Cust. App. 290, T.D. 31353 (1911); *Avakian Bros., Inc.* v. *United States*, 41 CCPA 80, C.A.D. 532 (1953); *D.N. & E. Walter & Co.* v. *United States*, 42 CCPA 114, C.A.D. 582 (1955); *F. A. Salamy & Co.* v. *United States*, 42 Cust. Ct. 204, C.D. 2086 (1959); *Westway Trading Corp.* v. *United States*, 83 Cust. Ct. 101, C.D. 4826 (1979), *appeal pending*. As our appellate court has reasoned in *Avakian Bros., Inc.*, until the physical severance of the goods required in the act of exportation has been fully completed by their final departure from the country of exportation, the goods continue to remain within the jurisdiction of the exporting country, subject to search and seizure and such controls as might be exacted.

Of particular interest in connection with the instant proceeding is the case of *Sampson* v. *Peaslee*, 61 U.S. (20 How.) 571 (1858). The physical acts referred to therein preparatory to the actual departure of the vessel carrying the exported merchandise are strikingly similar

to the preparatory physical acts alleged by the plaintiff in the instant proceeding and upon which the plaintiff predicates its claim that the merchandise in issue was exported prior to the date provided by Presidential Proclamation 4466. In the *Peaslee* case the goods in question had been purchased by the buyer's agent, the merchandise fully loaded on the cargo vessel, the bills of lading issued, the vessel cleared at the customhouse and ready to sail on July 1. Because of insufficient wind, however, the ship could not sail until July 3. In construing the valuation statute of our Customs laws, the Supreme Court, however, held that the date of exportation of the goods in question therein was the date the ship actually sailed, July 3.

In a case recently decided by this court the identical Presidential proclamations were considered and interpreted with respect to the determination of a similar issue presented herein. *Westway Trading Corp.* v. *United States*, 83 Cust. Ct. 101, C.D. 4826 (1979), *appeal pending*. In conformity with the precedential decisions afore-referred to, the date of exportation therein was determined to be the time at which the vessel carrying the merchandise in question finally departed the country of exportation.

Contrary to the assertion of the plaintiff, no indication has been evidenced by the courts that the determinations of the dates of exportation in *Avakian Bros., Inc.* and *D.N. & E. Walter & Co.* were peculiar to their being currency conversion and valuation cases respectively. As this court has stated in *Westway* with reference to these decisions, "(t)he reasoning of the courts therein, however, is equally applicable to and determinative of the date of exportation contained in Presidential Proclamation 4466 in the absence of accompanying language specifically indicating a construction otherwise." Slip op. at 10.

An examination of the decisions cited by the plaintiff reveals they are neither applicable to nor supportive of its contended construction of the term "exportation" in the instant proceeding. The plaintiff particularly relies on the meaning attributed to that term in the cases cited relating to the application of the provisions of article 1, sections 9 and 10 of the U.S. Constitution.[2] The date of exportation and the standard used by the courts in the determination thereof in connection with the application of the foregoing constitutional provisions upon merchandise intended for exportation reflect different purposes, and thus are not coextensive with, the date of exportation and the standard used by the court in the determination thereof for Customs purposes. See *Roessler & Hasslacher Chemical Co.*, 1 Ct. Cust. App. at 292–93.

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[2] Art. 1, sec. 9, clause 5 provides: "No tax or duty shall be laid on articles exported from any State."
Art. 1, sec. 10, clause 2 provides: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: * * *".

In view of the undisputed facts herein, establishing that the vessel carrying the merchandise in question departed the country of exportation at 7:30 a.m., local time, on September 21, 1976, this court concludes that said merchandise was not "exported to the United States before 12:01 a.m. * * * September 21, 1976," within the intendment of Presidential Proclamation 4466 and is, therefore, subject to the additional duty imposed by Presidential Proclamation 4463. The motion of the plaintiff for summary judgment is hereby denied, and the cross-motion of the defendant for summary judgment is granted.

Let judgment be entered accordingly.

(C.D. 4850)

J. E. BERNARD & CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Aircraft Temperature Control Components

Court No. 75-2-00375

Components of temperature control systems which are used in the cabins of DC-9 aircraft were appraised on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, T.D. 54165, at the prices paid by the airlines. Held, the proper dutiable values are the prices paid by the original equipment manufacturer, Douglas Aircraft Co.

Parties have stipulated that if the airlines do not purchase "for industrial use" under the definition contained in section 402(f)(3) of the Tariff Act of 1930, as amended, *supra*, then the prices paid by the original equipment manufacturer are the proper dutiable values.

The phrase "for industrial use" requires utilization of the purchased article to result in a product. *American Greiner Electronic, Inc.* v. *United States*, 57 Cust. Ct. 616, R.D. 11221 (1966), *rev'd on rehearing*, 62 Cust. Ct. 905, R.D. 11658, 298 F. Supp. 313 (1969), *aff'd*, 66 Cust. Ct. 644, A.R.D. 289, 328 F. Supp. 498 (1971), *appeal dismissed*, 60 CCPA 185 (1972); *Ampex Professional Products Co.* v. *United States*, 68 Cust. Ct. 249, R.D. 11765 (1972), *aff'd*, 70 Cust. Ct. 312, A.R.D. 316 (1973).

A negotiated price on the basis of a competitive bid is not a price arrived at by "bargaining" which would eliminate its use in determining export value.

[Judgment for plaintiff.]

(Decided March 28, 1980)

Stein, Shostak, Shostak & O'Hara, Inc. (*S. Richard Shostak* and *John N. Politis* at the trial; *Theo B. Audett* with them on the brief) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*John J. Mahon* at the trial and on the brief), for the defendant.

FORD, Judge: Plaintiff by this action is contesting the proper dutiable values of various parts of the temperature control systems [1] used in the cabins of DC–9 aircraft manufactured by Douglas Aircraft Co. The imported merchandise was manufactured in Canada by Garrett Manufacturing Ltd., the subcontractor for these parts, shipped to the United States and entered at the Port of Chicago, Ill., by J. E. Bernard & Co., Inc., a customhouse broker, for Douglas Aircraft Co.

The merchandise was appraised on the basis of export value, as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, T.D. 54165, at the prices paid by the airlines. Plaintiff agrees the proper basis of appraisement is export value but contends the proper dutiable values are the prices paid by the original equipment manufacturer (OEM), Douglas.

The pertinent portions of section 402 of the Tariff Act of 1930, as amended, *supra*, provide as follows:

> (b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.
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> * * * * * * *
>
> (f) DEFINITIONS.—For the purposes of this section—
>
> (1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—
>
> (A) to all purchasers at wholesale, or
>
> (B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,
>
> without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.
>
> (2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

[1] The parts are identified on the invoices in the entry papers as: 47662-3-sensor; 47676-3-control; 47676-5-1-control temperature; 607146-2-1-control temperature; 607148-1-sensor; 607150-1-1-control temperature; 607152-1-1-temperature selector; 607300-1-1-temperature sensor; and 607702-1-1-temperature control.

(3) The term "purchasers at wholesale" means purchasers who buy in the usual wholesale quantities for industrial use or for resale otherwise than at retail; or, if there are no such purchasers, then all other purchasers for resale who buy in the usual wholesale quantities; or, if there are no purchasers in either of the foregoing categories, then all other purchasers who buy in the usual wholesale quantities.

* * * * * * *

(5) The term "usual wholesale quantities", in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

At the outset of the trial, counsel for the respective parties stipulated and subsequently amended the stipulation as follows:

(1) The merchandise at issue is not on the "Final List," T.D. 54521 and is subject to appraisement under the new law, section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

(2) This merchandise is subject to appraisement on the basis of export value as defined in section 402(b) of said new law, as amended.

(3) The consignee in this case, Douglas Aircraft Co., is an original equipment manufacturer.

(4) The appraisements at issue herein were at unit prices based on the sale to airline purchasers of parts of environmental control systems for DC–9 aircraft identical to the parts at issue herein.

(5) In the event that the airlines which purchased parts of environmental control systems for DC–9 aircraft identical to the parts at issue herein are determined not to be purchasers for industrial use within the meaning of section 402(f)(3), Tariff Act of 1930, as amended, the prices, at the time of exportation to the United States of the merchandise in issue, at which such or similar merchandise was freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus packing, when not included in such prices, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, are the prices paid by the consignee, Douglas Aircraft Co., which is the original equipment manufacturer in this case.

The stipulation of the parties, particularly paragraph 5 thereof, presents a limited issue for determination by the court. The issue so presented is not whether the ultimate consignee and importer is a purchaser for industrial use as the term is utilized in section 402(f)(3), but whether airlines are purchasers for industrial use inasmuch as the appraisement was based upon the prices to airlines.

Based upon the record as made it is not disputed that there are two classes of purchasers of the involved merchandise and two sets of prices. The OEM, Douglas, purchases the complete system, known as ship sets, while the airlines purchase a limited number of replacement parts and never a complete system. The sale price to Douglas is based upon a competitive bid price while those sold to airlines as replacement parts are subject to a pricelist promulgated by the manufacturer, Garrett. It is further established by the record that while Douglas orders complete systems, individual components are shipped as required and each component has a specific price based upon the competitive bid. The airlines, on the other hand, order only those parts it deems necessary for replacement and are billed on the basis of the pricelist for all purchasers other than Douglas.

While neither the record nor the briefs indicate the involved purchases by Douglas to be parts of the complete system and not replacement parts, the court assumes they are components of the complete system. This assumption is based upon the fact of record that Douglas does not supply replacement parts to the airlines who purchase such parts directly from the manufacturer, Garrett.

Whether they are part of the order for the complete system is immaterial since the appraisement was based upon the prices to airlines. There appears to be no question that Douglas is an OEM who utilizes the system in the fabrication of the DC–9 aircraft. It is also apparent that airlines are not OEM's and purchase only for replacement of nonfunctioning parts.

Defendant contends the price to Douglas is not a freely offered price since the price to OEM is a negotiated price and does not qualify for consideration in determining export value. Additionally, defendant contends, since both the OEM and the airlines are industrial users, the only price at which all could purchase is the price to the airlines.

Defendant's position with respect to a negotiated price as not being qualified for determination of export value is based on the fact that it is a price arrived at by bargaining which is not a proper price for value consideration. *F. B. Vandegrift & Co., Inc.* v. *United States*, 56 CCPA 105, C.A.D. 962, 410 F. 2d 1259 (1969); *United States* v. *Mexican Products Co.*, 28 CCPA 80, C.A.D. 129 (1940).

The negotiated price involved herein is on the basis of a competitive bid. Mr. Alec J. Luckevich, assistant to the vice president of Garrett Corp. called on behalf of plaintiff described the process as follows:

> A. Garrett Manufacturing would present a technical proposal to Douglas Aircraft Co. and Douglas Aircraft Co. would then evaluate the technical proposal against others received from competitive suppliers and then select on the basis of both technical proposals and then picks the supplier they desire. In this

particular case it was Garrett Manufacturing, Ltd. which won the award.

A price arrived at in such a manner is not bargaining which would eliminate its use in determining export value.

However, before such price may be utilized it must be determined whether, within the statutory definitions prescribed by section 402(f) and particularly section 402(f)(3) in view of paragraph 5 of the stipulation, there are purchasers who fall within such category.

Section 402(f)(3) defines "purchasers at wholesale" as those "who buy in the usual wholesale quantities for industrial use or for resale otherwise than at retail * * *." The court is restricted to this level of purchasers at wholesale by virtue of paragraph 5 of the stipulation. The record is clear that Douglas falls within this level of purchasers at wholesale. Whether the airlines are purchasers for industrial use is not so readily determinable.

In *Ampex Professional Products Co.* v. *United States*, 68 Cust. Ct. 249, R.D. 11765 (1972), *aff'd*, 70 Cust. Ct. 312, A.R.D. 316 (1973), the trial court in considering the question of purchasers for industrial use made the following observations:

> Plaintiff attempts to disassociate these transactions from considerations on various grounds, the primary one being that CBS is not within the first category of "purchasers at wholesale" defined in section 402(f)(3), namely, purchasers who buy in the usual wholesale quantities for industrial use or for resale otherwise than at retail. The production of taped television programs which are subsequently broadcast over television stations is not, plaintiff urges, an industrial use.
>
> I do not agree. The business of producing network programs for broadcasting on a network affiliate is a known, recognized, albeit occasionally controversial, practice which constitutes a major economic factor in the billion dollar television industry. I am unable to perceive any significant difference, in assaying "industrial use" under the valuation statute, between the use of articles such as the steel strapping involved in *United States* v. *Acme Steel Company*, *supra* [51 CCPA 81, C.A.D. 841 (1964)], and the articles at bar.
>
> Furthermore, assiduous research into the legislative history of the Customs Simplification Act of 1956 fails to disclose any intent to give the term "industrial use" the narrow meaning ascribed to it by plaintiff. In the absence of such a showing, the appraising officer's presumptively correct finding that CBS purchased the cameras for "industrial use" has not been overcome.

Ampex is distinguishable on a number of grounds. As indicated, *supra*, the cameras in *Ampex* produced a product, to wit, network television programs, whereas the airlines in this case merely replaced nonfunctioning parts.

Research of counsel for the parties and the independent research of the court indicate one other case involving the question of pur-

chasers for industrial use. In *American Greiner Electronic, Inc.* v. *United States*, 57 Cust. Ct. 616, R.D. 11221 (1966), *rev'd on rehearing*, 62 Cust. Ct. 905, R.D. 11658, 298 F. Supp. 313 (1969), *aff'd*, 66 Cust. Ct. 644, A.R.D. 289, 328 F. Supp. 498 (1971), *appeal dismissed*, 60 CCPA 185 (1972), the issue involved watch timers. The court in considering the question of industrial use found that a sale to a watchmaker who utilized the timer in the manufacture of watches was a sale to an industrial user. Again a product was produced by utilizing the timer even though the article, the timer, was not consumed. Accordingly, judicial interpretation of the phrase "for industrial use" requires utilization of the purchased article to result in a product.

Airlines do not produce a product by utilization of spare parts purchased for replacement of defective parts of the temperature control system. The products of the airlines, namely, transportation, meals, etc., are not the products of the temperature control system. The same reasoning is applicable even though airlines are considered an industry by the "Standard Industrial Classification Manual" which is designated as major group 45.

Since airlines are not purchasers for industrial use, the court finds, based upon paragraph 5 of the stipulation of the parties, that the prices paid by Douglas are the proper dutiable values.

Judgment will issue accordingly.

(C.D. 4851)

G. M. RUBBER INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Footwear

Court No. 75-5-01099

Articles invoiced as "rubber overshoes" held properly classified by Customs under item 700.52 as footwear of rubber or plastics and not, as claimed by the plaintiff-importer, as other articles not specially provided for, of rubber or plastics.

[Judgment for defendant.]

(Decided March 31, 1980)

Siegel, Mandell & Davidson (*Herbert T. Posner* at the trial and on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Sidney N. Weiss* at the trial and on the brief), for the defendant.

MALETZ, Judge: This action involves the dutiable status of merchandise, described on the invoices as rubber overshoes, which was imported from Brazil by plaintiff and entered at the port of San Juan, Puerto

Rico during the period March 1973–January 1974. The merchandise was classified by Customs under item 700.52 of the Tariff Schedules of the United States (TSUS) as footwear of rubber or plastics, and assessed duty at the rate of 25 percent ad valorem. Plaintiff challenges this classification and claims the importations are properly classifiable under item 774.60 as other articles not specially provided for, of rubber or plastics, dutiable at the rate of 8.5 percent ad valorem.

The pertinent provisions of TSUS read as follows:

Classified under:		
Schedule 7, part 1, subpart A		
	Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:	
	Hunting boots, galoshes, rainwear, and other footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease, or chemicals or cold or inclement weather, all the foregoing having soles and uppers of which over 90 percent of the exterior surface is rubber or plastics (except footwear with uppers of nonmolded construction formed by sewing the parts thereof together and having exposed on the outer surface a substantial portion of functional stitching):	
* * * * * * *		
700.52	Footwear (except footwear provided for in item 700.51), the uppers of which do not extend above the ankle, designed for use without closures, whether or not supported or lined	25% ad val.
Claimed under:		
Schedule 7, part 12, subpart D		
	Articles not specially provided for, of rubber or plastics:	
* * * * * * *		
774.60	Other	8.5% ad val.

General interpretative rules:

10(h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

Plaintiff claims that the imported merchandise is neither finished nor unfinished footwear. Rather, it contends that the importations are parts of footwear and therefore cannot be classified under item 700.52 since that item does not contain a "parts" provision. For that reason, plaintiff concludes that the imported merchandise is properly classifiable under item 774.60 as other articles not specially provided for, of rubber or plastics.

The record in the case includes the testimony of three witnesses for the plaintiff and two witnesses for the defendant.[1] The record discloses the following:

The importations—which as previously noted were invoiced as rubber overshoes—had two types of soles, i.e., a grooved sole and a smooth sole. After the articles were imported into Puerto Rico, plaintiff added an "ice gripper sole coating" to the soles which consisted of a rubber adhesive coating combined with an abrasive alumina grit. The product with the grit sole was known as the "Ice Gripper" and was specifically designed for use on slippery surfaces such as ice and snow.

Plaintiff never sold the imported overshoes without the addition of the grit to the soles. The reason, according to plaintiff's witnesses, was that in their condition as imported the overshoes were unsafe for use on wet or icy surfaces because of the smooth or grooved surface of their soles. Further, laboratory tests showed that on a wet concrete surface the imported overshoes had very little slip resistance or traction as compared to similar articles which had a raised tread pattern. Based on these tests, the person who conducted them testified that the imported overshoes were unsafe and dangerous to the wearer on ice and snow in that the shoes supplied very poor footing with consequent risk of injury. In that witness' view, it was analogous to using a car tire without tread. In addition, the witness estimated that with the grit sole added, the overshoe provided 100 percent greater traction than in its condition as imported. However, the witness agreed that in its condition as imported, the overshoe provided greater traction than a leather sole shoe.

Defendant's witnesses testified that in their opinion the imported merchandise has utility as a rubber overshoe because it provides protection from water and contaminants and is therefore marketable in the United States. More specifically, these witnesses stated that the imported overshoes are marketable for use in animal husbandry and atomic energy plants. In this connection, they indicated that farmers

[1] The witnesses for plaintiff were: (1) Jack Rubin who was secretary-treasurer of plaintiff from 1968–77; (2) Felix Konstandt, the president and technical director of National Testing Laboratories, Inc., a commercial testing laboratory engaged in the testing and evaluation of consumer products; and Alvin Chanon, former vice president and later president of plaintiff during 1968–77.

The witnesses for defendant were: (1) Frank M. LeCompte, vice president in charge of engineering at the Tingley Rubber Corp., a manufacturer of rubber footwear; and (2) William McCollum, executive vice president in charge of marketing, advertising, and sales at the Tingley corporation.

who are engaged in animal husbandry, where it is important not to track contaminants from one bin to another, use overshoes of the type imported by plaintiff as a protection against such contaminants. Further, defendant's witnesses stated that rubber boots with treadless soles are used on contamination areas of atomic energy plants to protect the wearer from radiation dust and pointed out that some 19 years ago, their company had produced such a treadless rubber boot. They conceded, however, that at present no company produces an overshoe without a tread but indicated that their company has a standing offer from a major company in the industry to produce that type of boot for use in atomic energy facilities. The witnesses agreed that tread design on a rubber overshoe can greatly enhance its slip resistance. Finally, they stated that their company had never manufactured nor sold an article of merchandise with a sole identical to the soles found on the imported merchandise.

With respect to the cost of the grit, a witness for plaintiff testified that the imported merchandise cost plaintiff 80 cents per pair. He stated that the labor cost in Puerto Rico for adding the grit sole was $1.50 per pair and that the cost of the adhesive and grit was about 55 cents per pair. On the other hand, a witness for the defendant expressed the opinion that the grit sole could be applied for approximately 25 percent of the cost of the overshoe.

In this setting, it must be concluded that the merchandise at issue is of a class or kind designed to be worn as a protection from water or chemicals and thus is finished footwear. For the record is clear that rubber overshoes of the type involved here are of a class or kind which are designed to be worn, and in fact are worn, in animal husbandry and atomic energy plants to protect the wearer against these elements. This being the case, the imported merchandise falls within the provisions of item 700.52 which covers "footwear designed to be worn over, or in lieu of, other footwear as a protection against water, * * * or chemicals * * *."

In addition, it was plaintiff's burden to prove that the overshoes in question are not of a class or kind designed to be worn as a protection from these elements. And in this respect, the plaintiff has not rebutted the presumption of correctness that the appropriate Customs officer found every fact necessary to sustain classification under item 700.52. *United States* v. *New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). Thus, even accepting at face value the testimony of plaintiff's witnesses and plaintiff's argument that the overshoes are unsafe for use on ice or snow, this does not establish that they are of a class or kind unsuitable for use in animal husbandry and atomic energy installations for protection against water or chemicals. Indeed, the record is to the contrary. And it is

not dispositive that the soles of the imported overshoes are not identical to the soles used in animal husbandry and atomic energy plants.

What is more, even should it be assumed arguendo that the imported merchandise is not finished footwear, it still would be classifiable under item 700.52 as unfinished footwear. As previously indicated, general interpretative rule 10(h) provides that a tariff description for an article covers such an article whether it is finished or unfinished. And to constitute an unfinished article within the meaning of this rule, the article must be substantially complete. See, e.g., *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109, 486 F. 2d 1062 (1973); *Daisy-Heddon* v. *United States*, 66 CCPA 97, C.A.D. 1228, 600 F. 2d 799 (1979). In *Daisy-Heddon*, the court indicated that in determining whether an article is substantially complete the following factors can be relevant: (1) Comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and, (5) trade customs, i.e., does the trade recognize the importation as an unfinished article or as merely a part of that article.

Considering the first of these factors, i.e., comparison of omitted and nonomitted parts, the merchandise in the present case can be and is used as protective footwear in animal husbandry and atomic installations. The addition of the grit sole makes the product suitable for use on ice or snow and hence merely changes its market use. Aside from this, there is considerable doubt whether this factor is even applicable here since the merchandise is imported in the form of a rubber overshoe and the addition of the grit sole would seem properly describable as further processing rather than the addition of a part.

With respect to the second factor, i.e., a comparison of the time and effort required to complete the article with the time and effort required to place it in an imported condition, no evidence was presented as to the time and effort required in the manufacturing process either in Brazil or Puerto Rico.

Turning now to the third factor, namely a comparison of the cost of the included parts with that of the omitted parts, it must be concluded that the evidence presented by the parties was insufficient to make an adequate comparison of the cost of the overshoes with the grit sole and the cost of the overshoes without the grit sole. It is true that a witness for plaintiff testified that the cost of the overshoes with the grit sole was $2.85 per pair, while the cost of the overshoes without the grit sole was 80 cents per pair. However, little probative weight can be given to this testimony since there is a total absence of any

documentary or other supporting data. Beyond that, a witness for defendant expressed the opinion that the grit sole could be applied for approximately 25 percent of the cost of the overshoe.

The fourth factor is the significance of the omitted parts to the over all functioning of the completed article. Here, as pointed out above, the addition of the grit sole merely changes the market use of the product.

With regard to the last factor as to whether the trade recognizes the importation as an unfinished article or as a part of that article, it is to be noted that the articles are invoiced as "rubber overshoes." Persuasive too is the testimony of the defendant's witnesses that the merchandise, as imported, is marketable as, and meets the requirements of, rubber overshoes.

In sum, considering the factors set out in *Daisy-Heddon*, the conclusion is that the merchandise as imported, if not finished footwear, is at the very least unfinished footwear.

For the foregoing reasons, the classification of the importations by Customs under item 700.52 is affirmed and the action is dismissed.

(C.D. 4852)

RIEKES CRISA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Glass Candle Jars

Consolidated Court No. 65/19461

Glass jars imported from Mexico were classified by Customs officials as other glassware household articles, not specially provided for, under item 546.51 or 546.52 of the Tariff Schedules of the United States depending upon the date of entry, and assessed with duty at the rate of 50 per centum ad valorem. The importer contended that the merchandise should have been classified as other glass containers chiefly used for the packing, transporting, or marketing of merchandise under item 545.27 of the tariff schedules, and assessed with duty at various rates depending upon the date of entry. In the alternative, plaintiff claimed that the merchandise was properly classifiable as other articles of glass, not specially provided for, under item 548.05 of the tariff schedules, and dutiable at various rates depending upon the date of entry. The court found that the imported glass jars were specially designed and further processed for use as an integral component of a new article of commerce, a candle or candle lamp for the institutional trade and, therefore, were incorrectly classified by Customs officials as other glassware household articles. Plaintiff failed to sustain its primary claim of classification of the glass jars within item 545.27. Hence, the articles were properly classifiable under plaintiff's alternative claim as other articles of glass, not specially provided for, within item 548.05.

CHIEF USE—HOUSEHOLD ARTICLES

The record conclusively establishes that the imported glass jars are used in places other than the household, namely, the institutional trade, such as restaurants, hotels, and other public places. Therefore, plaintiff has sustained its burden of establishing that the imported articles do not belong to a "class or kind" of merchandise chiefly used in the household.

CHIEF USE—CONTAINERS FOR THE PACKING, TRANSPORTING, OR MARKETING OF MERCHANDISE

The "class or kind" of containers intended by Congress to be embraced by the provisions of item 545.27 are the usual, ordinary, and commonly used glass containers for various commodities or merchandise. The imported glass jars which were designed to be used, and were used, as an integral part of a new article of commerce, a candle or candle lamp, are not encompassed by that provision.

[Judgment for plaintiff.]

(Decided April 3, 1980)

Stein, Shostak, Shostak & O'Hara, Inc. (*Majorie M. Shostak* at the trial and on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Customs Litigation Branch (*Edmund F. Schmidt* and *Bernard Babb* at the trial; *Edmund F. Schmidt* on the brief), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for Customs duty purposes, of glass jars imported from Mexico. The glass jars are of three different styles known as the "Tiffany," the "Monterrey" or "Hurricane," and the "Parisian" or teardrop.

Ten of the fifteen consolidated protests include "Tiffany," "Monterrey" or "Hurricane," and "Parisian" or teardrop glass jars which were classified by the Customs officials under item 546.51 or 546.52 of the Tariff Schedules of the United States (TSUS) depending upon the date of entry, as other glassware household articles, not specially provided for. Consequently, they were assessed with duty at the rate of 50 per centum ad valorem.

The remaining five protests include only "Parisian" or teardrop jars which were classified under item 548.05, TSUS, as other articles of glass, not specially provided for. Hence, they were assessed with duty at the rate of 25, 22, or 20 per centum ad valorem depending upon the date of entry. At the commencement of trial, the defendant asserted that these "Parisian" or teardrop jars were erroneously classified under item 548.05, TSUS, and that the proper classification should be under item 546.51 or 546.52, TSUS, at the rate of 50 per centum ad valorem.

Plaintiff's primary claim is that all of the imported glass jars are properly classifiable as other containers of glass chiefly used for the packing, transporting, or marketing of merchandise, holding over 1 pint, under the provisions of item 545.27, TSUS. Hence, all three styles of the glass jars should properly be assessed with duty at the rate of 0.4, 0.35, or 0.3 cent per pound depending upon the date of entry.

In the alternative, plaintiff contends that if its primary claim is not sustained, the "Tiffany," the "Monterrey" or "Hurricane," and the "Parisian" or teardrop jars of the 10 protests are properly classifiable under item 548.05, TSUS, as other articles of glass, not specially provided for, dutiable at the rate of 25, 22, or 20 per centum ad valorem depending upon the date of entry.

Plaintiff makes no alternative claim as to those "Parisian" or teardrop jars of the remaining five protests since, as indicated, they were classified by the Customs officials under item 548.05, TSUS.

The pertinent statutory provisions are as follows:

Classified by Customs officials under:

TSUS:

"Articles chiefly used in the household or elsewhere for preparing, serving, or storing food or beverages, or food or beverage ingredients; smokers' articles, *household articles*, and art and ornamental articles, all the foregoing not specially provided for [italic added]:

* * * * * * *

Other glassware (entered or withdrawn from warehouse before January 1, 1968):

Valued not over $1 each:

* * * * * * *

546.51 Other ---------- 50% ad val."

TSUS as modified by T.D. 68–9:

"Other glassware (entered or withdrawn from warehouse after January 1, 1968):

* * * * * * *

Other:

546.52 Valued not over $0.30 each 50% ad val."

Claimed by plaintiff under:

TSUS or TSUS as modified by T.D. 68–9:

"*Containers* (except ampoules) *chiefly used for the packing, transporting, or*

marketing of merchandise, and containers chiefly used for home canning and preserving, all the foregoing, of glass, with or without their closures and whether or not coated with plastics materials [italic added]:

* * * * * * *

Other:

* * * * * * *

545.27	Holding over 1 pint	0.4¢ per lb. [before 1–1–68] 0.35¢ per lb. [1968] 0.3¢ per lb. [1969]"

Alternatively claimed by plaintiff under:

TSUS or TSUS as modified by T.D. 68–9:

"Articles not specially provided for, of glass:

* * * * * * *

548.05	Other	25% ad val. [before 1–1–68] 22% ad val. [1968] 20% ad val. [1969]"

Against this statutory background, the question presented is whether the imported glass jars are other glassware household articles, as classified; other glass containers chiefly used for the packing, transporting, or marketing of merchandise, plaintiff's primary claim; or other articles of glass, not specially provided for, as alternatively claimed.

On the record before the court and for the reasons that follow, it is the determination of the court that all of the imported glass jars are properly classifiable as other "(a)rticles not specially provided for, of glass," under item 548.05. Hence, under the item of the tariff schedules, they are dutiable at the rate of 25, 22, or 20 per centum ad valorem depending upon the date of entry.

In addition to the official papers, the record consists of the testimony of 3 witnesses for the plaintiff, 16 exhibits, 10 introduced by the plaintiff and 6 by the defendant, and the record in the case of *Corrigan Dispatch Co., a/c S. Riekes and Sons et al.* v. *United States*, 264 F. Supp. 897, 58 Cust. Ct. 110, C.D. 2899 (1967).

The parties stipulated that the glass jars in their imported condition are clear, and that the color processing occurs after importation. It was also stipulated that all of the glass jars are closed at the bottom, and that, after importation and further manufacturing, the final product is used with stands.

Plaintiff's first witness, Mr. Max Riekes, is chairman of the board of S. Riekes & Sons and president of plaintiff Riekes Crisa Corp. Mr. Riekes, who has been associated with these companies for over 40 years, identified Riekes Crisa Corp., as an importer of glassware from Mexico, and stated that the companies which also deal in domestic merchandise are involved in the container business selling items such as serum bottles, beverage bottles, and pharmaceutical bottles. The witness, who has traveled throughout the United States supervising sales and attending trade shows, testified also that showrooms are maintained in San Francisco, Los Angeles, Denver, Dallas, Chicago, Atlanta, and New York, and that their merchandise is sold throughout the United States and Canada to manufacturers and to the gift trade. Mr. Riekes visits the factory and is responsible for the purchase orders placed with his companies' Mexican manufacturer, Cristaleria, S.A.

Mr. Riekes also testified that he is familiar with the merchandise known as the "Parisian" or teardrop-style glass jar. He identified it as the merchandise at issue in the incorporated *Corrigan* case, and one of the styles of the three glass jars in the present action. In *Corrigan*, the "Parisian" jars were described as "clear cone-shaped containers of approximately 9 inches in length with the middle portion bulging out to a diameter of from 3 to 4 inches, narrowing at the top to an opening of about 2 inches and tapering to a point at the bottom."

The witness identified plaintiff's exhibit 1 as a representative sample of another style of glass jar imported in a clear condition known as the "Tiffany." Exhibit 2 was a drawing prepared by the Mexican manufacturer, Cristaleria, S.A., illustrating a third style clear glass jar known as the "Monterrey" or "Hurricane," and exhibit 3 was a red-colored sample of that article as it appears subsequent to the addition of color. He testified that all of the imported glass jars were sold by plaintiff exclusively to the Reed Candle Co. of San Antonio, and were not offered for sale to anyone else.

As imported, the merchandise was not marked with the name of the country of origin. The official papers reveal letters from the Reed Candle Co. to the appropriate Customs official requesting a waiver of the conventional marking requirements for these articles since they were to be further processed before sale. Some of the entries bear a rubber stamp, affixed by the Customs official at Laredo, which states that marking was waived under the Tariff Act of 1930, as amended. 19 U.S.C. 1304(a)(3)(G). On the statutory requirement that imported merchandise be marked with the English name of the country of origin, see *Globemaster, Inc.* v. *United States*, 340 F. Supp. 974, 68 Cust. Ct. 77, C.D. 4340 (1972).

Mr. Riekes testified that, as a result of his visits to the Reed Candle Co. plant, he has seen the glass jars processed and packed, knows how

they are used and how they are advertised for sale. All of the glass jars have a capacity of over 1 pint and are designed to be used with a stand.

On cross-examination, Mr. Riekes testified that during the period 1964 through 1969 the plaintiff sold open-bottom, hurricane-style articles to the lamp industry. He explained that when done, the bottom is cut from the glass jar solely for the use of the lamp industry.

He identified defendant's illustrative exhibit A as a page from the catalog of the Indiana Glass Co. depicting "votive" candle lamps and testified that those articles are chiefly used in the home as nightlights for decorative and religious reasons. The witness was familiar with the articles illustrated on defendant's exhibit B, consisting of pages 30–34 of the Davidson Uphoff Co. catalog, which depicted various candelabras with hurricane glass heads. He stated that these articles do not have closed bottoms, are sold only to retail florists, and are used for "weddings, funerals—anything in a church."

A page from the brochure of the Blenko Glass Co., defendant's illustrative exhibit C, was identified by Mr. Riekes as depicting handmade, decorative, free-form glassware. He explained these differences between Blenko's articles and the "Tiffany" glass jars: Blenko's are made by hand, without specifications as to size and height, and are used for decorative purposes while plaintiff's "Tiffany" jars are manufactured to exact specifications as to size and height, and are designed to hold an exact amount of wax.

Defendant's exhibit D pertained to the old-style "Monterrey" candle jar which Mr. Riekes testified had been imported by plaintiff on only two occasions for sale to the Reed Candle Co. between 1964 and 1969.

On redirect examination, Mr. Riekes testified that he knew an article known as a "votive candle," and identified it as a small candle used in a "votive glass." Its use, he stated, was for decorative purposes, heating, or "just to keep things warm." He also testified that this article is "sold * * * in all department stores."

On re-cross-examination, the witness identified style 1985, illustrated on defendant's exhibit A as being a votive candle lamp, and testified that because it is an expensive article, he has not seen it in use on restaurant tables except on special occasions.

Plaintiff's second witness, Mr. Peter Reed, the board chairman of the Reed Candle Co. of San Antonio, testified that he has been with that company for the past 26 years, and had previously served in other capacities, including production manager. During the period 1964 through 1969 he was in charge of manufacturing. His company manufactures and sells candles to large grocery chains, the institutional trade, and to churches.

330-630 O - 81 - 10

The witness testified that he was familiar with the "Parisian" glass jars that were the subject of the *Corrigan* case, and has read the transcript of the testimony given in that case by his brother, Henry Reed. He affirmed that as to the use, handling, marketing, and distribution of that article, his testimony would be the same.

On the "Tiffany" and the "Monterrey" glass jars, exhibits 1 and 3 in this case, the witness testified that after receiving them from the plaintiff in a clear condition, his company converts them into candles, i.e., the glass jar is colored, the wick is inserted, and the jar is then filled with wax. His company never sold the glass jars in their imported condition, nor did it sell the wax without the jars, it being more economical for the users to reorder the entire article.

He identified plaintiff's collective exhibit 4 as advertising literature prepared by his company illustrating the "Monterrey" jars and the stands or holders with which they are sold or used. Plaintiff's collective exhibit 5 is advertising literature which illustrates the "Tiffany" jars, the stands or holders designed for them, and the manner in which they were decorated and used when filled with wax. He stated that the imported jars are made to Reed's specifications as to size and shape. In order to meet the requirements of the institutional trade, they are specially designed to burn properly and provide illumination for 140 hours.

On the sale of the imported merchandise, the witness testified that after his company received orders at its San Antonio office from the John Sexton Co., it was shipped directly to the end users, i.e., restaurants, hotels, and country clubs.

Exhibit 6 was offered in evidence as a carton used for shipping one dozen candles, and exhibit 7 as a sample of the "Parisian" style candle after it had been consumed. The witness affirmed that after the candle is burned, the article is not suitable for any other use and is thrown away.

On cross-examination, Mr. Reed testified that he is aware that there are candles which are used to refill glass cylinders after the wax is consumed, and that defendant's exhibit E appeared to be a sample of a refill-type candle. From the testimony, however, it was clear that the imported jars are not refilled, but are thrown away after the candles are burned.

He stated that his company sells the "Parisian" and the "Monterrey" candle lamps in 12 colors, including a clear version. The "Tiffany" is made in 12 or 13 colors. He explained that the purpose of adding color to the glass is to give the customer a choice of color to match the decor of the restaurant. Mr. Reed did not agree that the "Parisian" is a candle lamp, and stated that it is a candle in a holder. He agreed that because of the design of the jar and the stand, the "Parisian" glass jar fits only in a Reed Co. candle stand.

Mr. Reed was aware of fishbowl-type glass jars with a net and poured-in wax, and testified that he had seen them used at parties, dances, and restaurants for illumination, and that they are institutional articles. He also stated that he had used a fishbowl-type candle in his yard, and had seen it used outside at garden parties.

On cross-examination, the witness testified that his company does manufacture and sell candles for household use and the giftware trade. The "Tiffany," the "Parisian," and the "Monterrey" candles could be used in the home, if they could be obtained from the John Sexton Co. He emphasized, however, that his company sells these articles exclusively to the John Sexton Co., which in turn sells only to institutional buyers.

Referring to defendant's exhibit F, a page from the brochure of the Miracle Candle Co. of Laredo, Tex., entitled "Candles for Wrought Iron," Mr. Reed testified that he was familiar with the glass jars illustrated therein, and that he had seen that company's products sold in supermarkets. He stated that these jars are usually religious-type articles, and can be used in the home.

On redirect examination, Mr. Reed testified that his company currently distributes candle jars to the institutional trade which are of a different style than the jars at issue, and identified exhibit 8 as a sample of one of those articles, and collective exhibit 9 as literature describing that type of article. Exhibit 10 was received in evidence as a sample of a consumed institutional candle holder similar to exhibit 8. Mr. Reed identified it as illustrative of the condition of the candle after it had been completely burned. He explained that after burning, the glass jar or "container" becomes soiled and unattractive and is, therefore, not reused.

Plaintiff's last witness, Mr. John C. Ryan, testified that he was formerly employed by the John Sexton Co. for over 40 years before his retirement in 1976, having served as branch merchandise manager of the Dallas office from 1948 through 1976. His duties included responsibility for inventory, purchasing, quality control, pricing, distribution, and preparation of promotional material for the salesmen. He testified that the John Sexton Co. is a wholesale institutional grocer, and that it did not offer its candles and stands to any trade other than the institutional trade.

Mr. Ryan testified that he had read a transcript of the testimony in the *Corrigan* case given by Mr. Thomas H. Butler, the present general manager of the Dallas division of the John Sexton Co. He stated that, if asked the same questions as were asked of Mr. Butler as to the Reed Candle Co. institutional candles and stands, his testimony would be the same.

Mr. Ryan testified that the John Sexton Co. did not maintain any stock of Reed candles at its own facilities, and confirmed the testimony given by the previous witness as to the use and sale of its merchandise.

On cross-examination, the witness testified that during the period 1964 to 1969, the John Sexton Co. handled only Reed candles, and did not sell candles, i.e., the wax and wick, without the glass jars.

Upon questioning by the court on the meaning of the words "disposable candles," Mr. Ryan referred to the fact that the company received reorders for the candles, consisting of the glass jar, the wax and wick, rather than for the metal holders or stands.

In contesting the classification of the imported glass jars, plaintiff contends that, based on the uncontradicted testimony of record, together with the relevant testimony and exhibits in the incorporated case, it has clearly established that the imported merchandise is not within the class or kind chiefly used in the household.

In support of its position, plaintiff submits that, because of the doctrine of stare decisis, the decision of this court in *Corrigan* is dispositive of the present case. Notwithstanding that there are three styles of the articles in the case at bar and that only one of them was before the court in *Corrigan*, plaintiff contends that the factual situation is the same in both actions. It indicates that it is apparent from the testimony of the witnesses that the use of all of the imported glass jars is the same, and has not changed since the decision in *Corrigan*. In addition to their present testimony to that effect, plaintiff submits that the witnesses testified that if they were asked the same questions as in *Corrigan*, their answers would be the same.

In the *Corrigan* case, the question presented was whether the "Parisian" glass jars were properly classifiable as blown-glass household articles under the provisions of paragraph 218(f) of the Tariff Act of 1930, as modified. It was plaintiff's primary contention that the merchandise was properly classifiable as jars, wholly or in chief value of glass, unfilled, suitable for use and of the character ordinarily employed for the holding or transportation of merchandise, under paragraph 217 of the act, as modified. In the alternative, plaintiff claimed the jars were properly dutiable as other illuminating articles, wholly or in chief value of glass, for use in connection with artificial illumination, under paragraph 218(c) of the act, as modified.

The court found that, according to the evidence, necessary and significant preliminary steps had to be taken before the containers were ready or commercially fit to hold and transport the merchandise they were exclusively designed to carry. Therefore, as imported, they did not come within the "suitable for use" condition required by the proviso in paragraph 217. Furthermore, the court found and held that the "Parisian" style glass jars were improperly classified as blown-

glass household articles under the provisions of paragraph 218(f). On that aspect of the decision, plaintiff submits that the court reached a conclusion which is applicable to the present case. Plaintiff maintains that the following quotation from the *Corrigan* case indicates that it is controlling authority:

> There can be no doubt that the uncontradicted evidence presented in this case conclusively establishes that the imported items are used in places other than the household, namely, restaurants, hotels, and the like. The weight of the evidence further indicates that the factors of size and shape incorporated into the design of these articles render them dissimilar to glass containers offered to the gift and retail trades. On the basis of such evidence, we find the collector's classification to have been successfully rebutted and the presumption attending that classification overcome. 264 F. Supp. at 901.

Plaintiff urges that here, as in *Corrigan*, the testimony of record establishes that: (1) The articles in issue were specially designed according to Reed's specifications for use as candle containers; (2) they were imported exclusively for the Reed Candle Co.; and (3) after processing were chiefly used in the institutional trade. Moreover, plaintiff emphasizes that they were not offered to the gift or retail trade, and were used in places other than the household.

In view of the foregoing, plaintiff submits that it has successfully overcome the presumption of correctness which attaches to the classification of the glass jars under items 546.51 and 546.52, TSUS, as other glassware household articles, not specially provided for.

Defendant maintains that the record does not support a finding that the merchandise is not of a "class or kind" chiefly used in the household. It argues that the provisions of items 546.51 and 546.52 are use provisions, and that general interpretative rule 10(e)(i) is applicable in the present case. That rule states that "a tariff classification controlled by use (*other than actual use*) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, *of articles of that class or kind to which the imported articles belong*, and the controlling use is the chief use, *i.e., the use which exceeds all other uses (if any) combined.*" [Italic added.]

Defendant states that it does not dispute the factual determination in *Corrigan* that the Reed Candle Co. candle lamps are used in the institutional trade. It emphasizes, however, it is not the use, or even the chief use, of the imported jars that must be established, but rather the chief use of the "class or kind" of merchandise to which they belong. Accordingly, the defendant argues that plaintiff's reliance on evidence establishing the uniqueness of the candles, their special adaptation to the institutional trade, and their dissimilarity to candles chiefly used in the home, is misplaced. The defendant contends that

the record establishes that the imported glass jars come within a "class or kind" of articles used in the household since they fall within the following criteria recently enunciated by the Court of Customs and Patent Appeals in *United States* v. *The Carborundum Co.*, 536 F. 2d 373, 377, 63 CCPA 98, 102, C.A.D. 1172, *cert. denied*, 429 U.S. 979 (1976):

> Factors which have been considered by courts to be pertinent in determining whether imported merchandise falls within a particular class or kind include the *general physical characteristics of the merchandise, the expectation of the ultimate purchasers*, the channels, class or kind of trade in which the merchandise moves, * * * the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed, * * * *The use, if any, in the same manner as merchandise which defines the class*, the economic practicality of so using the import, (and) the recognition in the trade of this use. (Citations omitted and italic added.)

The defendant asserts that the "class or kind" of article in issue here is not limited to Reed candle lamps, but includes all candle lamps or candles which belong to the same "class or kind." It argues that the testimony discloses that the imported glass jars are similar to candle lamps used in the home, and that they are used for the same purposes of illumination and decor. It also submits that according to the testimony of plaintiff's witnesses there is no separate class for candles used in the institutional trade, and for candles used in the home. For example, Mr. Reed testified that the candle lamps in issue could be used in the home if they could be obtained from the Sexton Co. In fact, however, they could not be obtained from Sexton.

As in all Customs cases, plaintiff has the burden of overcoming the statutory presumption of correctness which attaches to the classification of the Customs officials. 28 U.S.C. 2635. To overcome this presumption, the plaintiff must prove that the Customs classification was wrong, and that its claimed classification is correct. *United States* v. *New York Merchandise Co.*, 435 F. 2d 1315, 58 CCPA 53, C.A.D. 1004 (1970); *Technical Tape Corp.* v. *United States*, 55 CCPA 38, C.A.D. 931 (1968).

It is not questioned that the provisions for glassware household articles in items 546.51 and 546.52 are "chief use" provisions, and that what must be ascertained is the chief use of the "class or kind" of articles to which the imported glass jars belong. Thus, the initial question presented is whether the plaintiff has borne its burden of proving that the glass jars in question do not belong to a "class or kind" of merchandise chiefly used in the household.

In Customs classification cases, chief use, when in dispute, is a question of fact to be determined on the basis of positive testimony.

L. Tolbert Co. v. *United States*, 41 CCPA 161, C.A.D. 544 (1953). Whether the chief use of imported merchandise has been established depends upon the issues and the evidence in each case. *United States* v. *F. W. Woolworth Co.*, 23 CCPA 98, T.D. 47765 (1935).

The case of *United States* v. *The Carborundum Co.*, 536 F. 2d 373, 63 CCPA 98, C.A.D. 1172, *cert. denied*, 429 U.S. 979 (1976), relied upon by both parties in support of their respective positions, sets forth the factors which have been considered by courts in determining whether imported merchandise falls within a particular "class or kind." As previously stated these factors include "the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, * * * the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), * * * the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, (and) the recognition in the trade of this use." 63 CCPA at 102.

Applying the foregoing pertinent factors to the evidence in this case, it is the finding of the court that the plaintiff has successfully established that the imported glass jars do not belong to a "class or kind" of merchandise chiefly used in the household. The uncontroverted testimony, which the court finds to be credible and reliable, proves beyond question that the imported glass jars are used in places other than the household, namely, the institutional trade which consists of restaurants, hotels, and other public places.

The record clearly discloses that the imported glass jars were specially designed according to Reed's specifications, and were further processed in order to be used as a component part of a candle or candle lamp by institutional users. Their design was the result of experiments with various sizes and shapes in order to meet the specific requirements of the institutional trade. One of these requirements was for a minimum burning time of 140 hours. To achieve this, the manufacturer had to adhere strictly to the exact diameter of the glass jar. Another requirement was for the opening or mouth of the jar to be so designed as to permit a proper amount of oxygen to enter, while at the same time permitting the right amount of carbon exhaust to escape without causing adverse smoking conditions or odor. In addition, each jar was specially designed for use with a stand or holder.

The unquestioned testimony also shows that the imported glass jars were delivered exclusively to John Sexton Co., a wholesale institutional jobber; that they were usually colored and filled with a low-melting wax; that they were processed and converted by the Sexton Co. into institutional candles; that the candles with the stands were

distributed by the Sexton Co. solely to institutional users; and that they were not offered for sale to the gift or retail trade. In summary, the article that was manufactured was an institutional candle designed to fulfill the "expectation of the ultimate purchasers." 63 CCPA at 102.

While *Corrigan* did not deal with the identical tariff provisions under which the merchandise at bar was classified, it finds substantial application here. The merchandise at bar is similar in all material respects to the merchandise in *Corrigan*. The "Parisian" glass jar, the merchandise in *Corrigan*, is one of the three glass jars in the present case. The remaining two glass jars, the "Tiffany" and the "Monterrey," are, without dispute, the same in character, use, and function as the "Parisian" jars. Hence, what was said in *Corrigan*, as to the nature or kind of merchandise in issue, is also applicable here.

Moreover, as to the judicial interpretation and application of the concept of "chief use," there is no basic distinction between the provisions for "blown-glass household articles" in paragraph 218(f) of the Tariff Act of 1930 involved in *Corrigan*, and the present provisions for "glassware household articles" in items 546.51 and 546.52 of the tariff schedules. In both statutory provisions, the fundamental question for determination is the same, i.e., whether the imported articles belong to a class or kind of merchandise chiefly used in the home.

As was pointed out by the court in *Corrigan*, "(t)he collector's classification of the instant merchandise as blown-glass household articles carries with it the presumed finding of fact that they are chiefly used in or about the environs of the home. *M. Pressner & Co.* v. *United States*, 49 Cust. Ct. 221, Abstract 67019; *Ace Importing Co., Inc.* v. *United States*, 44 Cust. Ct. 468, Abstract 64185." 58 Cust. Ct. at 115. This presumption was rebutted in *Corrigan* as to the "Parisian" glass jar. Since the "Parisian" glass jar is similar in all material respects to the remaining two imported glass jars, what was said as to the rebuttal of the presumption of correctness in *Corrigan* also applies here.

The rationale of the court in *Corrigan*, in denying the classification of the "Parisian" glass jar as a "blown-glass household article" under the provisions of paragraph 218(f), is fully applicable to the present situation. Surely, the specific determination of this court in *Corrigan*, that the "Parisian" glass jar is used in places other than the household, further supports plaintiff's position here.

Defendant does not dispute the factual determination in *Corrigan* that these particular Reed Candle Co. candle lamps are used exclusively in restaurants and hotels. It maintains, nevertheless, that they are classifiable as glass household articles if "they belong to a class or kind of glass articles chiefly used in the home."

The defendant has failed to supply the court with any evidence in support of its position. The record is devoid of any evidence that the imported glass jars were designed and sold for use in the household. On the contrary, as the record reflects, the plaintiff has submitted uncontradicted evidence that the imported glass jars are of a special design rendering them dissimilar to glass containers offered to the gift and retail trade, and that, when further processed, are used in places other than the household.

Furthermore, defendant's attempt to establish that variously styled candle lamps manufactured by Reed's competitors, the Indiana Glass Co., and the Miracle Candle Co., were used both in the home and in restaurants is not helpful. Testimony to the effect that other articles, similar in certain respects to the imported glass jars after processing, may be used in the home as well as in restaurants does not establish the chief use of the glass jars in issue. In its most favorable evaluation, this testimony would simply tend to show that the imported glass jars, after processing, are capable of, or adaptable for, use in the home.

The argument of capability or adaptability of the imported merchandise to the common use of the class in establishing chief use was considered and reviewed by this court in *The Baltimore & Ohio R.R. Co.* v. *United States*. 40 Cust. Ct. 58, C.D. 1959 (1958). In that case, the court found that the imported after-dinner cups and saucers belong to a class of novelty articles chiefly used for display or decoration, and were, therefore, dutiable as decorated china other than tableware under the provisions of paragraph 212, Tariff Act of 1930, as modified, rather than, as classified, as tableware under that paragraph. In affirming this decision, the Court of Customs and Patent Appeals made the following pertinent observation:

> Merely because one *can* drink from the imported cups and saucers does not establish the chief use thereof. A fugitive use or a mere susceptibility or capability of use is not controlling as to such chief use. [Italic in original.] 47 CCPA 1, 5, C.A.D. 719 (1959).

Defendant further contends that there is nothing about the nature of the imported merchandise, or merchandise of the same class or kind, which prevents its eventual use in the household. In support of this argument, defendant points to the testimony of Mr. Reed. When asked on cross-examination if there was anything about the "Tiffany" jar which would prevent its use in the home, he replied "(t)here is nothing to physically keep someone from using it, if they can purchase it. But they (would) have to be able to purchase it." The mere fact that the imported glass jars may possess characteristics which do not prevent their use in the household is not proof that they are actually used in the household, and surely does not establish that they are "chiefly used" in the household.

On the testimony of record, the court has concluded that plaintiff has overcome the presumption of correctness attached to the classifications of the imported glass jars under the provisions of items 546.51 and 546.52 of the tariff schedules.

On its primary claim that the imported glass jars are containers chiefly used for the packing, transporting, or marketing of merchandise, plaintiff contends that they are similar in nature, use, and characteristics to the merchandise which was the subject of *Will & Baumer Candle Co.* v. *United States*, 37 CCPA 27, C.A.D. 414 (1949), and *United States* v. *Richard Hudnut*, 15 Ct. Cust. Appls. 463, T.D. 42646 (1928). Hence, plaintiff contends that the holdings and the reasoning of those cases are applicable and controlling here.

In *Will & Baumer Candle Co.* v. *United States*, 21 Cust. Ct. 149, C.D. 1146 (1948), the merchandise consisted of open-end glass containers imported empty. They were designed and sold for the purpose of holding and transporting wax for use as a unit in a sanctuary lamp. They were classified as decorated glassware under paragraph 218(f) of the Tariff Act of 1930. The importer claimed classification under paragraph 217 of that act, as modified, as unfilled jars, wholly or in chief value of glass, not specially provided for, suitable for use and of the character ordinarily employed for the holding or transportation of merchandise. This court found that the article was designed and manufactured for a definite purpose other than as a jar "ordinarily employed for the holding or transportation of merchandise," and that the use of the article as a shipping container was incidental to its main or principal use as a holder for the candle when used in the sanctuary lamp. The court stated that "(t)o fall within paragraph 217, the articles must be not only suitable for use for the holding or transportation of merchandise, but must also be of the character ordinarily employed for such purposes." Therefore, it held the imported jars were not dutiable as jars "suitable for use and of the character ordinarily employed for the holding or transportation of merchandise" within the provisions of paragraph 217. That decision was reversed by the Court of Customs and Patent Appeals. Plaintiff places special emphasis upon the following quoted portion of the decision of the appellate court:

> The candles which are "held or transported"—in the instant case they are both held *and* transported—certainly are merchandise, although they are designed for a special use. The containers themselves, the only articles whose classification is of concern here, are certainly suitable for use in holding the candles and for transporting them, and they are in fact ordinarily so used by appellant. Indeed, they appear to have been developed for those precise uses. They ordinarily hold the merchandise before it is sold and hold it while it is being transported to the purchaser, thus meeting both alternatives designated in the provi o.

We do not think that in order to fall within the meaning of the phraseology of the proviso the containers are required to be of a kind suitable to be used and ordinarily used in holding or transporting *all kinds* of candles. Where a special type of such merchandise exists and a specially designed container is made and used for holding or transporting it, we think the requirement of the statute is met, provided, of course, the container meets the statutory requirements in other respects. [Italic in original.] 37 CCPA at 31.

In arriving at its conclusion, the appellate court indicated that it was persuaded by the reasoning of the *Richard Hudnut* case. In *Hudnut*, the merchandise consisted of decorated talcum powder jars which were assessed under paragraph 218 of the Tariff Act of 1922 as blown-glass articles decorated or ornamented in any manner. The jars were imported empty and filled with talcum powder after importation. Then, by means of a "crimping machine," they were fitted with brass sprinkler or shaker tops, the perforations in which may, by means of slides, be opened or closed at will. The tops were so contrived and fitted that they could not be removed without injury to them and the jars. This court found that, "(t)he specific description of these jars and the use to which they are applied are real distinguishing marks that remove them from paragraph 218 and place them under the provisions of paragraph 217." The court also found that they "are of a character ordinarily employed in the holding and transportation of merchandise" and held that the jars therefore fell clearly within the eo nomine provision of paragraph 217 for lime bottles and jars. 51 Treas. Dec. 304, T.D. 42049 (1927). The Court of Customs Appeals, in affirming that decision, said, "(t)he jars involved in this case are suitable for use and of the character ordinarily employed for the holding and transportation of merchandise—talcum powder; and as they are not appliances or implements in chemical or other operations, or bottles for table service, or thermostatic bottles, they are directly covered by the provisions of paragraph 217, and more specifically provided for therein than in paragraph 218." 15 Ct. Cust. Appls. at 468.

Plaintiff submits that the evidence in the present case is the same as in the foregoing cases: (1) The glass jars are specially designed for and used by the Reed Candle Co. solely to contain candles which will burn for approximately 140 hours for use by the institutional trade; (2) the glass jars are designed to be used in holders, or stands, manufactured by Reed; (3) the glass jars are used for packing, transporting, and marketing the candles from the time they are decorated and filled by Reed, throughout the period of storage and distribution by the John Sexton Co. to institutional users, and throughout the period of storage by its institutional customers until the candles are consumed and the jars discarded. Hence, plaintiff concludes that the use of the glass jars in this case is principally for packing, transporting, and marketing the candle while it is in the commercial stage.

Plaintiff also asserts that, although the court in *Corrigan* rejected the importer's primary claim that the "Parisian" glass jars should be classified under paragraph 217 as jars suitable for use and of the character ordinarily employed for the holding or transporting of merchandise, a different finding is appropriate in the present case. Plaintiff insists that the language of item 545.27, which encompasses containers "chiefly used for the packing, transporting, or marketing of merchandise," is much broader than the language in the earlier provisions of the Tariff Act of 1930. Furthermore, the court in *Corrigan* found that the jars were not ready or commercially fit upon importation to hold or transport the merchandise they were exclusively designed to carry since further processing was required. In *Corrigan* the imported glass jars had to be colored and decorated before they were filled with candle wax and the wick. On the other hand, in the instant case the evidence shows that the glass jars were offered and could be used as candle jars in their clear condition as containers for candles without further processing.

Even assuming that the articles at issue were not usable in their imported condition as containers for candles, plaintiff states that they would nevertheless be properly classifiable under item 545.27 pursuant to general interpretative rule 10(h). That rule provides that "unless the context requires otherwise, a tariff description of an article covers such article, whether assembled or not assembled, and whether finished or not finished." Plaintiff submits that the coloring and decorating were the only operations performed on the jars before filling them with wax, and that these operations did not change their nature into something other than candle containers.

Finally, plaintiff contends that it is basic in Customs law that an article may be classified under its eo nomine provision if it has been so far processed, advanced, and dedicated to the making of that article or class of articles, or has been so far advanced beyond the stage of materials as to be commercially fit for use only as that article. See *United States* v. *The Servco Co.*, 477 F. 2d 579, 60 CCPA 137, C.A.D. 1098 (1973), and *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States*, 600 F. 2d 799, 66 CCPA 97, C.A.D. 1228 (1979). Consequently, the plaintiff argues that if the glass jars as imported are not deemed to be containers for the packing, transporting, or marketing of candles, then they should nevertheless be considered unfinished containers since the only process performed on them prior to filling them with wax is the coloring and decorating of the glass to enhance their appearance. Plaintiff therefore maintains that whether deemed finished or unfinished, they are nevertheless properly classifiable under item 545.27.

In the alternative, plaintiff claims that should the court determine that the glass jars are not classifiable under item 545.27, TSUS, then

they are classifiable under item 548.05, TSUS, as other articles of glass, not specially provided for. It contends that since the articles are of glass, they come within the purview of item 548.05, a basket provision for those glass articles which are not provided for elsewhere in the tariff schedules.

As to plaintiff's primary claim, defendant contends that the glass jars are not containers for merchandise, but integral parts of candle lamps. It points out that plaintiff's witness, Mr. Reed, testified that after the glass jars are imported, the Reed Candle Co. colors and fills them with wax and a wick, and converts them into candles. Thus, it has created a new article of commerce, a candle or candle lamp. The defendant maintains that since the glass jars have become part of the merchandise which is packed, transported, and marketed, they are not containers for the merchandise. It submits that an article cannot be both the merchandise and the container.

In support of its position the defendant cites the cases of *Bruce Duncan Co.* v. *United States*, 63 Cust. Ct. 412, C.D. 3927 (1969), and *Morris Friedman & Co.* v. *United States*, 56 Cust. Ct. 21, C.D. 2607 (1965). In the *Bruce Duncan* case, metal cartridges filled with butane and invoiced as butane lighter tanks, were classified under item 756.15, TSUS, as parts of cigar and cigarette lighters, Plaintiff claimed that, by virtue of item 475.15 and general headnote 6(b)(i) of the tariff schedules, the tanks were entitled to free entry as the usual transportation containers for butane. The court found that the sole purpose of the cartridge was to serve as a container of fuel for the lighter. It was designed to fill the lighter, and without it the lighter would not be able to function. Whether or not the tanks contained fuel, however, was held to be without significance. The court held these cartridges were not the usual containers envisioned by general headnote 6(b)(i) of the tariff schedules. Notwithstanding the fact that the cartridges served as shipping containers for the butane, the court held that plaintiff failed to overcome the burden of proving that the classification of the cartridges, as parts of cigar and cigarette lighters, was incorrect.

In the *Morris Friedman* case, the merchandise as imported consisted of a decorative ceramic miniature mug or cup, containing a wax or paraffin substance with a wick in the center. The merchandise had been assessed with regular duty under paragraph 1536 of the Tariff Act of 1930, as modified, as a candle, and with an additional duty on the ceramic portion, as an unusual container under paragraph 211, as modified, as decorated earthenware. The court held the candle to be properly dutiable as an entirety under paragraph 211, as modified. In the course of its opinion, the court stated:

> In the instant case, the merchandise is imported as a unit. It cannot be disassembled without destroying one or both of the

components. It is bought and sold as a unit, and functions as a unit. The candle portion never had any separate identity as a candle. While the cup portion might have a separate identity as a miniature mug, it was not imported or used as such, according to the testimony, and required the addition of the wax portion to become the completed article. The cup is *not a container*, usual or unusual, *but an integral functioning portion of the entire article.* [Italic added.] 56 Cust. Ct. at 26.

Defendant contends that the facts in the *Bruce Duncan* and *Morris Friedman* cases are analogous to the present case, and that, therefore, the rationale of those cases is applicable here. Thus, it maintains that the testimony of record here discloses that the glass jars after importation were used as an essential constituent part of the Reed candle lamps; that the wax and wick never had a separate identity as a candle; and that the glass jars were specially designed to become an integral functioning part of Reed's candle lamps. Accordingly, the defendant submits that since the imported merchandise has become an integral part of a manufactured candle, it cannot be both the merchandise and the container.

Defendant submits that prior cases, in which the courts have held imported merchandise to be dutiable as "suitable for use and of the character ordinarily employed for the holding or transportation of merchandise" under predecessor provisions of the Tariff Acts of 1922 and 1930, reveal the type of articles found to be containers. It cites *Balfour-Guthrie & Co.* v. *United States*, 23 CCPA 1, T.D. 47652 (1935) (in which the merchandise consisted of beer (stout) bottles, imported filled with stout); *De Boer & Livingston (Inc).* v. *United States*, 58 Treas. Dec. 387, T.D. 44301 (1930) (in which the merchandise consisted of glass bottles used for holding toilet water); and *Frederick Stearns* v. *United States*, 53 Treas. Dec. 38, T.D. 42542 (1928) (in which the imported merchandise consisted of small glass bottles used to hold Astringosol, a mouthwash).

In each of these cases, the court found the merchandise to be suitable for use, and of the character ordinarily employed, for the holding or transportation of merchandise, and therefore classifiable under paragraph 217 of the Tariff Act of 1930. The defendant states that it is clear that the merchandise in these cases was respectively, the beer, the toilet water, and the mouthwash, and that the glass bottles, in each instance, were the containers.

In *Fontana Hollywood Corp.* v. *United States*, 64 Cust. Ct. 204, C.D. 3981 (1970), long-neck gallon bottles, imported filled with chianti wine, were subject to tariff treatment as imported articles, separate from the wine content, under item 546.35 as household articles. Plaintiff's primary contention was that the imported bottles should not have been separately dutiable. Alternatively, it contended that, in the

event the bottles were found to be separately dutiable, they were properly classifiable as containers of glass chiefly used for packing, transporting, or marketing merchandise under TSUS item 545.27. As to plaintiff's alternative claim, defendant argued for exclusion of the imported bottles from classification under item 545.27 on the ground that they were unusual containers, that is, of a kind not usually or ordinarily employed to ship, transport, or market merchandise. In rejecting defendant's argument, the court said:

> * * * TSUS item 545.27 does not classify containers ordinarily or commonly employed for the holding or transportation of merchandise (as did par. 217). What it does classify are *containers chiefly used for the packing, transporting, or marketing of merchandise*. The fact that a container is chiefly used for the packing, transportation, or marketing of merchandise is not inconsistent with its not being a bona fide container for transportation, or, if you will "unusual," that is, of a kind not usually or ordinarily employed to ship, transport, or market merchandise. [Italic in original.] 64 Cust. Ct. at 212.

The court upheld plaintiff's alternative claim that if separately dutiable as classified, the bottles were properly classifiable under item 545.27 as containers chiefly used to pack, transport, and market the wine.

The defendant indicates that the glass bottles in *Fontana* were not incidental to the merchandise purchased, and had not become an integral part of the wine, or merchandise, as have the glass jars in the present case. It emphasizes that in all of the cited cases, the glass containers had a separate identity, that their use was incidental to the contents, and that they had never become an integral constituent part of the merchandise itself.

The *Will & Baumer* and *Hudnut* cases, and the case at bar, are distinguishable since the imported merchandise is significantly different as to characteristics, use, and function. The glass jars in *Will & Baumer* were designed and sold for the definite purpose of holding and transporting wax candles for use as a unit, and inserted in sanctuary lamps of churches. For that purpose, the jar was designed to have a graduated depression or indentation running practically its entire length, and two lugs or projections on its top rim. The red glass lamp shell, into which the imported glass jar and wax candle were to be inserted, had a lug or bulge in its lower portion which fit into the indentation of the glass jar. Originally, the candles were shipped in wooden or cardboard cases but, due to high temperature and handling, often became damaged and out of shape. To rectify that condition, the glass jars were developed to hold and ship the wax candles. At no time were the imported glass jars subjected to further processing in order to accomplish their intended purpose. They were used in

the condition as imported, and retained their individual identity and characteristics.

Unlike the imported glass jars in *Will & Baumer*, the imported glass jars at bar were not designed to be used in the condition as imported. Necessary and significant operations were performed before they could be used for their intended purpose. As previously noted, they were specifically designed to hold candles which would burn for approximately 140 hours. Moreover, after importation the jars were colored and the wick was positioned before they were filled with wax sufficient to provide the required 140 hours of illumination. The imported glass jars did not retain their individual identity after importation. The necessary processing converted them into an integral component of a new article of commerce, a candle or candle lamp. Furthermore, it may be added that any doubt as to the holding of the *Will & Baumer* case may be resolved by a reference to the *Hudnut* case upon which the appellate court relied for its decision. Indeed, the court in referring to *Hudnut* in that case stated that "the reasoning there seems analogous and persuasive here." 37 CCPA at 32.

In *Hudnut*, the colored lime glass jars, imported empty, were filled with talcum powder after importation, and were used to hold and transport the talcum powder. They were designed exclusively to contain the talcum powder as is evidenced by the fact they were fitted with brass sprinkler tops that were not removable without injury to them or to the jars. Unlike the glass jars of the instant case, their identity was separate from the talcum powder and not subordinated to a new combined article. It is obvious that the glass jars in *Hudnut* are significantly different from the glass jars in this case as to their nature, use, and characteristics.

It should also be noted that in *Will & Baumer* and *Hudnut*, the court was concerned with the statutory interpretation and application of the phrase, unfilled glass jars "suitable for use and of the character ordinarily employed for the holding or transportation of merchandise" in paragraph 217 of the Tariff Acts of 1922 and 1930. In the present case, item 545.27 of the tariff schedules provides for containers *chiefly used* for the packing, transporting, or marketing of merchandise. The issue of chief use was neither raised nor determined in the cited cases. Clearly, a decision which holds articles *suitable* for a certain use does not imply or require a finding of *chief use*. *United States* v. *Lorsch & Co.*, 8 Ct. Cust. Appls. 109, T.D. 37222 (1917).

It is plaintiff's contention that the candle wax packed and contained in the imported glass jars is a commercial commodity or an article of commerce, and is merchandise as that term is used in item 545.27. Hence, it claims that the candle wax is the merchandise for which

the imported glass jars serve as containers, principally used for its packing, transporting, or marketing. Citing the case of *United States* v. *Lilly & Co. and Parke, Davis & Co.*, 14 Ct. Cust. Appls. 332, T.D. 41970 (1927), quoted with approval in *Border Brokerage Co.* v. *United States*, 50 Cust. Ct. 233, Abstract 67500 (1963), plaintiff states that it is well established that the term "merchandise" includes whatever is bought or sold in trade or by merchants.

In the *Lilly & Co.* case, the imported merchandise consisted of glass ampoules or vials, imported empty, and "specially contrived for the transportation of pharmaceutical and biological preparations which are to be used in a medicinal way." The court found that the medicinal and biological products were generally bought and sold commercially, and were therefore within the common meaning of the term "merchandise." In *Border Brokerage*, the imported merchandise consisted of fertilizer sample units that include both a container and fertilizer material. The unit was distributed by the importer as an advertising medium to enhance the sale of its fertilizer material. The court found that the unit—the plastic container and the fertilizer material—was the commericial commodity or the article of commerce, and hence the merchandise.

The respective articles found by the court to be merchandise in the cited cases are distinguishable from the candle wax in the case at bar.

In the *Lilly* case, the merchandise—the medicinal and biological products—had a distinct identity as a separate article of commerce. In transporting these products the imported glass vial also retained its separate identity as a glass vial. Unlike the candle wax in the present case, the medicinal and biological products were not merged by further processing with the glass vial to create a new and distinct article of commerce.

In *Border Brokerage*, the imported merchandise was the fertilizer sample unit which, in its condition as imported, was designed and ready for use as a complete article of commerce. Since the candle wax is not the imported merchandise in the present case, it is clearly distinguishable from the merchandise in *Border Brokerage*. Furthermore, unlike the fertilizer sample unit, the candle wax to fill the imported glass jars was created in the United States, and serves as a necessary integral part of a new article, a candle lamp, without which it could not function. The candle wax does not have a separate identity, use, or commercial value other than as a combined article with the imported glass jars. This conclusion is inescapable from the testimony of plaintiff's witness, Mr. Reed, who stated that due to its low melt point, the wax would have no form or shape without the glass jars. Plaintiff's contention that the candle wax is the merchandise that was packed and transported in the imported glass jars is therefore without merit.

330-630 O - 81 - 11

The foregoing considerations also apply to plaintiff's contention that the imported glass jars serve as containers for the candle wax. Although the glass jars may have had separate identity as glass jars, they were neither designed, nor intended to be used as glass jars. They were designed to be further processed after importation, and required the addition of the wax and wick to become a completed article of commerce. The identity of the imported glass jars was subordinated to the new combined article, a candle or candle lamp.

The meaning of "(c)ontainers * * * chiefly used for the packing, transporting, or marketing of merchandise," as used in item 545.27, and particularly the term "containers," was first judicially interpreted in the *Fontana* case, *supra*. In holding that the imported long-neck gallon bottles, filled with chianti wine, were within the purview of that provision, the court quoted the following reference to item 545.27 in the 1960 Tariff Commission report:

> The proposed provisions for "other" containers (TSUS items 542.21 through 545.27) embrace the bottles and jars commonly used for the packing and transportation of merchandise and are substantially unchanged from the existing provisions in paragraph 217. * * * (Tariff Classification Study, schedule 5, p. 139.) 64 Cust. Ct. at 211.

Consistent with this expression that the present tariff description of the term "containers" is substantially unchanged from the predecessor statute, an examination of the legislative history and judicial interpretation of the terms "bottles" and "jars" encompassed by the prior tariff provisions provides further guidance as to the class or kind of articles held to be containers.

The most recent decision of this court on the meaning of paragraph 217 of the Tariff Act of 1930 is the *Border Brokerage* case, *supra*. In that case, the imported fertilizer sample units, which included both a plastic container and fertilizer material, were classified by similitude in use to manufactures of glass, not specially provided for, under paragraph 230(d) of the Tariff Act of 1930, as modified, and paragraph 1559(a), as amended. Plaintiff claimed that the merchandise was properly classifiable under the provision for nonenumerated manufactured articles in paragraph 1558 of the Tariff Act of 1930, as amended. In the alternative, plaintiff claimed that if the imported merchandise was dutiable by virtue of the similitude provision of paragraph 1559(a), it was then classifiable as similar in use to glass vials, jars, or bottles, filled or unfilled, under paragraph 217 of the Tariff Act of 1930. In rejecting plaintiff's alternative claim, the following observation of the court is particularly pertinent:

> The plastic container is an integral component of the present merchandise, in its condition as imported. It is not the kind of

container provided for in paragraph 217 * * *. 50 Cust. Ct. at 235.

In the *Balfour-Guthrie & Co.* case, *supra*, 23 CCPA 1, T.D. 47652 (1935), the court held that certain glass bottles, imported filled with stout, were ordinary beer bottles, and stated that they "are, obviously, designed, suitable, and of the character ordinarily employed, for the holding or transportation of merchandise, and clearly dutiable under paragraph 217." The court indicated that pertinent to its consideration was the determination of the Court of Customs Appeals in *United States* v. *Sassi*, 13 Ct. Cust. Appls. 319, T.D. 41233 (1925). The *Sassi* case dealt with paragraph 217 of the Tariff Act of 1922, the predecessor of paragraph 217 of the Tariff Act of 1930. The imported merchandise there consisted of empty chianti bottles, partly covered with straw, and used for the holding and transporting of vinegar. The bottles were held to be within the scope of paragraph 217, Tariff Act of 1922, as bottles, "suitable for use and of the character ordinarily employed for the holding or transportation of merchandise."

Other cases describing the characteristics of the class or kind of bottles * * * or jars found by this court to be embraced within the provisions of paragraph 217 of the Tariff Act of 1922 have been examined earlier in this opinion. See *De Boer & Livingston (Inc.)* v. *United States*, 58 Treas. Dec. 387, T.D. 44301 (1930), and *Frederick Stearns* v. *United States*, 53 Treas. Dec. 38, T.D. 42542 (1928).

On the provisions of paragraph 217 of the Tariff Act of 1922, the "Summary of Tariff Information" (1929), a recommended source to resolve questions on the meaning and scope of terms which appear in various tariff acts, states at page 504:

> GLASS BOTTLES AND OTHER GLASS CONTAINERS
>
> Description and uses.—The glass bottles and other glass containers covered by this paragraph are the usual and *ordinary glass containers used for beverages, foodstuffs, chemicals, medicines, vaccines, antitoxins,* and other *commodities,* such as *scouring* and *cleansing creams, powders, polishes,* and *soaps.* [Italic added.]

The authorities teach that the class or kind of containers intended by Congress to be embraced by the provisions of item 545.27 are the usual, ordinary, and commonly used glass containers for various commodities or merchandise. Hence, the imported glass jars which were designed to be used, and were used, as an integral part of a new article of commerce, a candle or candle lamp, are not encompassed by that provision.

As previously noted, plaintiff's claimed classification is based on chief use. It is axiomatic that chief use "is to be determined in accordance with the use in the United States at, or immediately prior

to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined." TSUS general interpretative rule 10(e)(i).

On the record presented and the applicable authorities, it is the determination of the court that the imported glass jars are not containers, as that term is used in item 545.27, and do not meet the requirement of chief use as containers within that statutory provision.

Plaintiff has referred to general interpretative rule 10(h) which provides that "unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished." It maintains that the only processing performed on the imported glass jars, prior to their filling with candle wax and wick, was the coloring and decorating. Accordingly, plaintiff contends that this operation did not change the nature of the imported glass jars into something other than candle containers, the use for which they were dedicated in their condition as imported.

Plaintiff has also urged that in Customs law an article may be classified under the eo nomine provision for that article if it has been so far processed, advanced, and dedicated to the making of that article or class of articles, or has been so far advanced beyond the stage of materials as to be commercially fit for use only as that article. *United States* v. *The Servco Co.*, 477 F. 2d 579, 60 CCPA 137, C.A.D. 1098 (1973); *Finn Bros. Inc.* v. *United States*, 454 F. 2d 1404, 59 CCPA 72, C.A.D. 1042 (1972); *American Import Co.* v. *United States*, 26 CCPA 72, T.D. 49612 (1938). The principle stated is inapplicable here for the record shows that the imported glass jars were not dedicated to use merely as containers. The jars were employed as articles to be further processed in the ultimate production of a new and different article, to wit, a candle or candle lamp, an article with a distinctive character and intended use, different from the imported glass jars. Therefore, the imported glass jars cannot be considered containers, whether finished or unfinished.

Plaintiff's contention that the eo nomine designation applies to this case is unpersuasive for two additional reasons. First, it is clear that the term "containers" in item 545.27 is a "use" description, and not an "eo nomine" designation. Second, the eo nomine designation has no application since the record conclusively establishes that the imported glass jars were so far advanced by processing as to become more than mere glass jars. They were transformed into a new and different article, a candle or candle lamp. On this point, the following observation of

this court in *Fender Brokerage Co.* v. *United States*, 41 Cust. Ct. 264, C.D. 2049 (1958), is particularly pertinent:

> We are in accord with the general principle of law, which is well established and widely used in customs jurisprudence, that an eo nomine designation without terms of qualification or limitation embraces the named product in all forms and conditions. However, the principle of law is not to be used indiscriminately or without limitation. Where an article has been so far advanced as to have been transformed into a new article or dedicated to a particular use, this principle of law is inapplicable. 41 Cust. Ct. at 266.

The court has determined that the imported glass jars were improperly classified as other glassware household articles under the provisions of items 546.51 and 546.52 of the tariff schedules. It is also the determination of the court that the plaintiff has failed to sustain its burden of proof that the imported glass jars are properly classifiable under item 545.27 of the tariff schedules as "(c)ontainers * * * chiefly used for the packing, transporting, or marketing of merchandise." With respect to those glass jars classified under items 546.51 and 546.52, it is necessary to determine the validity of plaintiff's alternative claim under item 548.05. Plaintiff contends that if its claim for their classification under item 545.27 is not sustained, then they are properly classifiable under item 548.05, a basket provision for all articles of glass, not specially provided for. *L & B Products Corp.* v. *United States*, 70 Cust. Ct. 30, C.D. 4404 (1973); "Tariff Classification Study," schedule 5 at 145.

It is undisputed that all of the imported glass jars in issue are, in fact, glass articles. Since there is no more specific provision in the tariff schedules under which they may be classified, they come within the purview of item 548.05 as alternatively claimed by plaintiff. Consequently, the classification of the Customs officials is overruled as to all of the "Tiffany," all of the "Monterrey," and those "Parisian" glass jars classified under items 546.51 and 546.52; and sustained as to those "Parisian" glass jars classified under item 548.05.

Accordingly, upon the record before the court and for the reasons stated, it is the determination of the court that all of the imported glass jars are properly classifiable under the provisions of item 548.05 of the Tariff Schedules of the United States (TSUS) as other articles, not specially provided for, of glass, and dutiable at the rate of 25, 22, or 20 per centum ad valorem depending upon the date of entry.

Judgment will be entered accordingly.

(C.D. 4853)

EDDIETRON, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 79-2-00306

JURISDICTION—TIME TO COMMENCE ACTION

An importer of golf carts seeks to contest the assessment of dumping duties on seven protested entries. Defendant moved to dismiss claiming that the action was not timely filed. The court held that the action was timely filed when the action was commenced by mailing the summons by certified mail within the 180-day limit prescribed by 28 U.S.C. 2631(a)(1).

CUSTOMS COURT RULES—COMMENCEMENT OF ACTION—FILING BY MAIL

Rule 3.2(b) of the Rules of the Customs Court permits an action to be commenced by mailing of a summons to the court by certified mail, and the summons is deemed filed as of the date of mailing. *United States* v. *Fairfield Gloves et al.*, 558 F. 2d 1023, 64 CCPA 126, C.A.D. 1194 (1977). In absence of a postmark, a date stamp on the certified mail receipt is satisfactory proof of date of filing and proof of compliance with the requirements of rule 3.2(b).

JURISDICTION—PAYMENT OF DUTIES BY PROMISSORY NOTE—ESTOPPEL

Execution and delivery of a promissory note does not satisfy the jurisdictional prerequisite of payment of all liquidated duties required by 28 U.S.C. 1582(c)(2). See also 19 U.S.C. 197, 198; *Don E. Williams Co.* v. *Commissioner of Internal Revenue*, 429 U.S. 569, 97 S. Ct. 850 (1976). By its acceptance of the promissory note, the United States is not estopped from denying that it served as payment. *Air-Sea Brokers, Inc.* v. *United States*, 596 F. 2d 1008, 66 CCPA 64, C.A.D. 1222 (1979).

PAYMENT OF DUTIES—PARTIAL PAYMENT OF PROMISSORY NOTE COVERING MULTIPLE PROTESTS

Partial payment on a promissory note tendered for the amount of duties owed on six protests may, for jurisdictional purposes, be treated as payment in full of the liquidated duties owed on the first protest. *Champion Coated Paper Co.* v. *United States*, 24 CCPA 83, T.D. 48411 (1936).

[Motion to dismiss granted in part.]

(Dated April 16, 1980)

W. Warren Sparrow for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Customs Litigation Branch (*Velta A. Melnbrencis*, Assistant Director, on the briefs), for the defendant.

Re, Chief Judge: Plaintiff, an importer of golf carts from Poland, sues to recover certain dumping duties assessed on seven protested

entries covered by this action. Defendant, alleging lack of jurisdiction, moves to dismiss the action upon the grounds that it was not timely commenced, and that the liquidated duties were not paid at the time it was filed.

Essentially, the following three questions are presented by defendant's motion to dismiss:

1. Is an action timely commenced when the summons is mailed within, but not received until after, the 180 days prescribed in 28 U.S.C. 2631(a)(1), and the postmark evidencing the date of mailing appears on a receipt for certified mail?

2. Does delivery and receipt of a promissory note constitute the payment of duties, required as a jurisdictional prerequisite under 28 U.S.C. 1582(c)(2), at the time an action is filed?

3. May a partial payment of the total amount owed on a promissory note delivered in payment of duties owed on six entries, be applied, for jurisdictional purposes, as payment on the first of those entries?

It is the determination of the court that this action has been timely filed. The court has also determined that, although the delivery and receipt of the promissory note does not constitute payment of duties on the six entries, the partial payment may be applied as payment in full of the duties owed on the first of those entries.

TIMELINESS

The seven protests were denied on August 16, 1978. Within 180 days thereafter, the summons instituting this action was sent on February 12, 1979, by certified mail return receipt requested, to the clerk of the court. The summons was received in the office of the clerk, and marked filed, on February 15, 1979, after the 180-day period.

In connection with defendant's motion to dismiss for untimeliness, plaintiff moves to have the record corrected to show that the summons was filed on the date it was mailed, i.e., February 12, 1979. In support of its motion, plaintiff submits a certified mail receipt bearing a postmark date of February 12, 1979. The envelope in which the summons was mailed and received in the office of the clerk bears no postmark.

Rule 3.2 of the rules of this court provides in material part:

> (b) Summons: Filing by mail; date of filing: For purposes of commencement of an action, *a summons sent by registered or certified mail* properly addressed to the clerk of the court at One Federal Plaza, New York, N.Y. 10007, with the proper postage affixed and return receipt requested, *shall be deemed filed as of the date of postmark.*
>
> * * * * * * *
>
> (e) Summons: Date of filing; motion to correct:
>
> (1) The records of the clerk, including the date of filing stamped on the summons, or when sent by registered or certified mail the

date of postmark, shall be final and conclusive evidence of the date on which a summons was filed unless a motion to correct the record is made and granted pursuant to subparagraph (2) of this paragraph (e).

(2) A party who contends that the effective filing date of a summons should be a date other than the date shown in the records of the clerk may seek a corrective order by motion made pursuant to rule 4.12, and the court may, upon satisfactory proof that the records of the clerk with respect to the filing date were incorrect, order the record corrected. [Italic added.]

In *United States* v. *Fairfield Gloves et al.*, 558 F. 2d 1023, 64 CCPA 126, C.A.D. 1194 (1977), the Court of Customs and Patent Appeals upheld the validity of rule 3.2(b) which permits an action to be "commenced" by the mailing of a summons to the court, rather than exclusively by the receipt of the summons in court, within the statutory period prescribed by 28 U.S.C. 2631(a), which provides:

§ 2631. *Time for commencement of action.*

(a) An action over which the court has jurisdiction under section 1582(a) of this title is barred unless commenced within 180 days after:

(1) the date of mailing of notice of denial, in whole or in part, of a protest pursuant to the provisions of section 515(a) of the Tariff Act of 1930, as amended; or

(2) the date of denial of a protest by operation of law pursuant to the provisions of section 515(b) of the Tariff Act of 1930, as amended.

Of course, when an action is commenced by mailing a summons in the manner prescribed by rule 3.2(b), the operative fact is the date of *mailing*. For the purpose of commencing an action, a summons is deemed filed as of the date of mailing, rather than the date of receipt, if the specified method of mailing is utilized, and plaintiff shows by satisfactory proof that the conditions of mailing imposed by the rule have been satisfied. See *Texas Mex Brick & Import Co.* v. *United States*, 371 F. Supp. 579, 72 Cust. Ct. 291, C.R.D. 74–2 (1974); *Modern Clothing, Inc.* v. *United States*, 73 Cust. Ct. 233, C.R.D. 74–10 (1974).

As this court held in the *Fairfield Gloves* case, 77 Cust. Ct. 166, C.R.D. 76–10 (1976), *aff'd*, *United States* v. *Fairfield Gloves*, *supra*, a date-stamped receipt for certified mail is, as in this case, satisfactory proof of compliance within the requirements of rule 3.2(b). See also *Richardson* v. *Brown*, 443 F. 2d 926, 928 (10th Cir. 1971). Hence, since the summons in this action was deemed to have been filed on February 12, 1979, within the period prescribed by 28 U.S.C. 2631 (a)(1), it has been timely filed.

PAYMENT BY PROMISSORY NOTE

The facts pertaining to the payment of duties also are not in dis-

pute. This action challenges the denial of seven protests (Nos. 1401–7–000135 through and including 1401–7–000141). The duties owed on the entry covered by protest No. 1401–7–000141 were timely and fully paid. As to the duties owed on the entries covered by the six remaining protests, plaintiff, on or about October 3, 1978, executed and delivered a promissory note in the amount of the duties owed. The appropriate Customs official "accepted" the note and marked as "canceled" the invoices for the remaining entries.

The issue here is whether the delivery and acceptance of the promissory note satisfies the jurisdictional prerequisite of payment of all liquidated duties required by 28 U.S.C. 1582(c)(2). In material part, this section provides that this court shall not have jurisdiction of an action unless "all liquidated duties, charges or exactions *have been paid* at the time the action is filed." [Italic added.]

Section 1582(c)(2) does not prescribe, nor does it indicate, the acceptable *method* of payment of duties. Prior to the Customs Courts Act of 1970, this provision was not included in title 28. A similar provision, however, was included in section 1515 of title 19 which provided that when a protest is filed against a collector's decision he shall "* * * in the case of merchandise entered for consumption, if all duties and charges *shall be paid*, then the collector shall forthwith transmit the entry * * * to the U.S. Customs Court * * * ." [Italic added.]

This statutory requirement for the payment of duties was transferred, in the Customs Courts Act of 1970, from 19 U.S.C. 1515 to 28 U.S.C. 1582. Although there is a difference in the language used, that is, from "shall be paid" to "have been paid," the statutory prerequisite of payment is the same. Furthermore, there is nothing in the legislative history of the Customs Courts Act of 1970 to suggest that a different meaning was intended.

Other provisions of title 19 may be examined to determine the acceptable method of payment.

The statutory method for paying duties upon imports is prescribed in 19 U.S.C. 197 and 198. The general requirement is set out in section 197, which provides, in pertinent part:

> Except as provided in section 198 of this title all duties upon imports shall be collected in ready money, and shall be paid in gold and silver coin, coin certificates, and such other certificates or Treasury notes as may by law be declared receivable in payment thereof.

Section 198, which contains the exception to this method of payment, permits a "provisional payment" of duties to be made by certified check. This exception, however, specifically provides that payment by certified check does not satisfy the "obligation to make ultimate payment" until the certified check has been "duly paid."

Specifically, section 198 states that:

> No person, however, who may be indebted to the United States on account of duties on imports who shall have tendered a certified check or checks as *provisional payment* for such duties or taxes, in accordance with the terms of this section, shall be released from the obligation to make ultimate payment thereof *until such certified check so received has been duly paid* * * *." [Italic added.]

Regulations promulgated by the Secretary of the Treasury authorize other methods for paying duties. See 19 CFR 24.1 (a) and (b). It is significant, however, that neither the statutes nor the regulations authorize the payment of duties by a promissory note which, of course, is merely a written *promise* to pay. See *Don E. Williams Co.* v. *Commissioner of Internal Revenue*, 429 U.S. 569, 582–583, 97 S. Ct. 850 (1977).

Even if a promissory note were an appropriate mode of payment, the mere tender and acceptance of a promissory note does not mean that the duties *have been paid* within the meaning of 28 U.S.C. 1582 (c)(2). By analogy to 19 U.S.C. 198, which permits a certified check to be tendered as provisional payment, the statutory scheme would suggest that a promissory note, at best, could only be considered as a provisional payment. A provisional payment would not satisfy the requirement to make ultimate payment until it has been paid in full, and the funds have been received by the United States. Accordingly, since the United States did not receive funds sufficient fully to discharge plaintiff's liability at the time this action was filed, plaintiff had not made the payment of all liquidated duties as mandated by 28 U.S.C. 1582(c)(2) as a prerequisite to this court's jurisdiction.

Plaintiff contends that the defendant should be estopped from denying that the promissory note served as payment for all six entries since the defendant accepted the note, and, in the normal course of business, accepts payment for duties in forms other than ready money. Judge Miller, however, writing for the Court of Customs and Patent Appeals, has recently noted that "equitable estoppel, even if available in cases involving the Government in its proprietary capacity, is not available against the Government in cases involving the collection or refund of duties on imports." *Air-Sea Brokers, Inc.* v. *United States*, 596 F. 2d 1008, 1011, 66 CCPA 64, C.A.D. 1222 (1979).

It is the determination of the court that, for jurisdictional purposes, the promissory note does not constitute payment of the duties owed on the six entries covered by protest Nos. 1401–7–000135 through and including 1401–7–000140.

DUTIES ON PROTEST NO. 1401–7–000141

As stated previously, liquidated duties pertaining to protest No. 1401–7–000141, covering entry No. 115364, were fully paid. Conse-

quently, as to that denied protest, this action may be maintained. See *United States* v. *Novelty Imports, Inc.*, 476 F. 2d 1385, 60 CCPA 131, C.A.D. 1096 (1973).

APPLICATION OF PARTIAL PAYMENT

In addition to paying the duties owed on protest No. 1401–7–000141, plaintiff also paid, before this action was commenced, $7,652.81 on account of the promissory note which was tendered for the amount due on the six remaining denied protests. This is sufficient to discharge the amount of duties owed on one of the six protests, viz, on the first protest, No. 1401–7–000135. To assure its right to sue in this court, plaintiff seeks to have this amount applied to, and, for jurisdictional purposes, treated as the payment of the duties owed on the first of those six protests, i.e., No. 1401–7–000135.

As in nearly all questions neither expressly nor clearly covered by the governing statute, plaintiff's request requires a balancing or weighing of competing considerations. On the one hand, plaintiff, who attempted in good faith to satisfy the statutory prerequisite of payment of duties by tendering a promissory note, seeks judicial review of alleged wrongful government action. This tender was accepted by the appropriate Customs official who canceled the invoice for the duties owed.

On the other hand, as a prerequisite to jurisdiction, the statute requires that the duties owed on the protested entry, which is the subject of an action, have been paid at the time the action was filed.

In order to decide plaintiff's requested application the court must ascertain the legislative intent for requiring the payment of duties, and, whether that intent would be violated by granting the requested relief.

Appropriate guidance may be found in the salutary observation of Judge Rich, who, writing for a unanimous court in *Novelty Imports, Inc.*, *supra*, stated that "statutes should not be given a 'wooden and even perverse construction.' " In *Novelty Imports*, as in the case at bar, the pertinent statute was 28 U.S.C. 1582(c)(2). Surely, citation of authority is not required for the proposition that the statute must be read in proper context so as to effectuate the legislative purpose.

In *Champion Coated Paper Co.* v. *United States*, 24 CCPA 83, 88, T.D. 48411 (1936), the question presented before the Court of Customs and Patent Appeals was whether it was "a condition precedent to appellant's right of recovery that it pay to the collector the sum demanded as a result of his reliquidation of the drawback entries." If payment was a condition precedent, since appellant had not paid, the protest had been properly dismissed by the Customs Court. In order to determine that question, the appellate court examined the

statutes pertaining to consumption entries, which, as here, required the payment of duties as a precondition to the right of protest. The Court of Customs and Patent Appeals affirmed the decision of the Customs Court, and held that payment of duties was a precondition to the protest.

The reasoning of the court indicates that it reached its decision because, without payment of the duties demanded, the appellant had not been actionably damaged. 24 CCPA at 89. That plaintiff had to be "damaged" or "injured" may be noted from the following quotation of the appellate court from the opinion of the Customs Court:

> The statute contemplates that the importer must have some substantial matter about which he may file a protest. If his merchandise is in bond at the time of liquidation and he is called upon to pay additional duties over those deposited, he must pay them before he can procure delivery. If they have been delivered under bond, then in order to put the Government in a position where it can be protected as well as to show that the importer has been put at a financial disadvantage, he must pay the amount of the duties, etc. 24 CCPA at 88.

The appellate court also quoted the following significant sentence from the decision of the Customs Court:

> The importer is here in a case wherein he has not, so far as we can see, been in any manner injured, nor has any property been taken from him, nor have any of his rights been invaded such as would give him any standing in this court. Ibid.

The rationale of the *Champion Coated Paper* opinions indicates that the application of the $7,652.81 for jurisdictional purposes, as payment of duties on the entry covered by protest No. 1401–7–000135, would not be inconsistent with the payment requirement under 28 U.S.C. 1582(c)(2). The $7,652.81 payment not only serves to put the Government in a position where it can be protected, but also establishes that the importer has been put at a financial disadvantage and has been actionably damaged.

At the time the $7,652.81 payment was made, the parties may have treated it as partial payment on the total amount due on the invoices for all six entries. Nevertheless, for jurisdictional purposes in this action, there is no valid reason why that payment cannot be applied to satisfy in full the amount owed on the first of the six entries. Since, as to denied protest No. 1401–7–000135, "all liquidated duties * * * have been paid," the jurisdictional requirement of the statute has been fulfilled.

In summary, it is the determination of the court that the summons in this action is deemed filed as of the date of the certified mail receipt postmark, February 12, 1979, which is within the period prescribed by 28 U.S.C. 2631(a)(1).

As to the seven denied protests included within that summons, the court determines further that, for purposes of 28 U.S.C. 1582(c)(2), the liquidated duties on the entries covered by protest Nos. 1401–7–000141 and 1401–7–000135 have been paid. Hence, as to these protests, they are to be severed, and the action continued.

As to the entries covered by the five remaining protests included in the summons, i.e., protest Nos. 1401–7–000136 through and including 1401–7–000140, since the liquidated duties on these protests have not been paid, the defendant's motion to dismiss is granted.

(C.D. 4854)

In Re U.S. International Trade Commission Investigation No. AA1921–147A (Electric Golf Cars From Poland)	Court No. 80–4–00580

Opinion and Order

(Dated April 30, 1980)

Watson, Judge: Plaintiff, Melex U.S.A., Inc., is an importer of golf cars from Poland, which cars were the subject of an antidumping finding in 1975 (T.D. 75–288). Plaintiff is presently a participant in an administrative proceeding instituted in February 1980 at its request, in which the defendant International Trade Commission (ITC), under section 751 of the Tariff Act of 1930, is investigating whether changed circumstances justify a revocation of the previous finding of dumping and remove the threat of material injury to a domestic industry.

In the course of the aforementioned proceeding, plaintiff requested confidential information submitted by domestic interests in accordance with section 777(c)(1) of the Tariff Act of 1930. The ITC denied the request. Plaintiff subsequently brought this action under section 777(c)(2) of the Tariff Act of 1930, seeking court-ordered disclosure of confidential information submitted concerning the price of domestic golf cars.

Defendant has moved to dismiss for failure to state a claim as well as for summary judgment. Plaintiff has made a cross-motion for summary judgment. Oral argument has been held in which the Harley-Davidson Motor Co., Inc., the party submitting the information to which plaintiff's request related, participated.

Defendant raises two basic jurisdictional challenges to the action. The first, which is of lesser consequence, argues that to allow this action would somehow give retroactive application to section 777(c)(2), prior to the January 1, 1980, effective date of the Trade Agreements

Act of 1979 (Public Law 96–39). However, it seems clear to the court that the origin and effect of this action is entirely related to events occurring after January 1, 1980. Only after that date was the investigation initiated, the confidential information submitted, and the request for it by plaintiff denied. The entire dispute is directed toward a future decision by the ITC, which will be potentially subject to judicial review under section 516A(2)(B)(iii) of the Tariff Act of 1930, itself a creation of the Trade Agreements Act of 1979. In short, all the operative facts of this dispute arose subsequent to the effective date of the Trade Agreements Act of 1979, and the mere fact that this is an inquiry into the possible revocation of a 1975 dumping finding is of no jurisdictional significance.

Defendant's second jurisdictional challenge is a much more serious one and is based on the text of section 777(c)(2).

> "(2) DISCLOSURE UNDER COURT ORDER.—*If* the administering authority denies a request for information under paragraph (1), or *the Commission denies a request for confidential information submitted by the petitioner or an interested party in support of the petitioner concerning the domestic price or cost of production of the like product*, then application may be made to the U.S. Customs Court for an order directing the administering authority or the Commission to make the information available. After notification of all parties to the investigation and after an opportunity for a hearing on the record, the court may issue an order, under such conditions as the court deems appropriate, which shall not have the effect of stopping or suspending the investigation, directing the administering authority or the Commission to make all or a portion of the requested information described in the preceding sentence available under a protective order and setting forth sanctions for violation of such order if the court finds that, under the standards applicable in proceedings of the court, such an order is warranted, and that—
>
> "(A) the administering authority or the Commission has denied access to the information under subsection (b)(1),
>
> "(B) the person on whose behalf the information is requested is an interested party who is a party to the investigation in connection with which the information was obtained or developed, and
>
> "(C) the party which submitted the information to which the request relates has been notified, in advance of the hearing, of the request made under this section and of its right to appear and be heard." [Italic supplied.]

Defendant argues that section 777(c)(2), by its explicit language, does not apply to the circumstances in which plaintiff finds itself and does not provide plaintiff with an action for court-ordered disclosure. Defendant stresses that the circumstances described by section 777(c)(2) are the denial of a request for confidential information "* * * submitted by the petitioner or an interested party in support of the petitioner * * *." Defendant notes that the investigation into

changed circumstances under section 751 has no petitioner. In this respect it stands in marked contrast to the antidumping proceeding described in section 732, which is commenced by the filing of a petition on behalf of an industry, and which therefore fits together easily with section 777(c)(2).

Plaintiff argues that the legislative intention was to provide court-ordered disclosure in all instances and cites with understandable emphasis the report of the Senate Committee on Finance on H.R. 4537 which states as follows at page 100:

> Reasons for the provision.—Section 777 provides the maximum availability of information to interested parties consistent with the need to provide adequate protection for information accorded confidential treatment. Petitioners under the antidumping and countervailing duty laws have long contended that their ability to obtain relief has been impaired by its lack of access to the information presented by the exporters and foreign manufacturers. By the same token, importers, exporters, and other respondents in such cases have complained of lack of access to information supplied by the domestic parties to such cases, particularly with respect to the economic health of the domestic industry involved. Access to information at the administrative level is even more imperative under the bill, which provides that the standard of judicial review of most administrative actions in countervailing duty and antidumping duty proceedings is one of review on the administrative record.

Nevertheless, although the court can recognize a question of whether the statutory text completely expresses the legislative intent, it would go beyond judicial interpretation to change the explicit language of the statute. The term "petitioner" simply has too precise a legal meaning to surmise that it was used by the legislature in a loose manner. See, *Case* v. *Los Angeles Lumber Co.*, 308 U.S. 106, 115 (1939).

It therefore appears that with respect to a proceeding under section 751, the ITC has the discretion under section 777(c)(1) to decide whether or not it will disclose confidential information and that following the exercise of that discretion the information is not subject to court-ordered disclosure under section 777(c)(2).

For the reasons expressed above, it is hereby

ORDERED, that defendant's motion to dismiss be, and the same hereby is, GRANTED.

(C.D. 4855)

SANYO ELECTRIC INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Power Failure Lights

Court No. 75-9-02446

Merchandise invoiced as power failure lights, classified as flashlights under item 683.70 of the Tariff Schedules of the United

States, and assessed with duty at the rate of 35 per centum ad valorem, *held* properly classifiable under item 688.40, as modified, as electrical articles, not specially provided for, with duty of 5.5 per centum ad valorem.

JUDICIALLY DETERMINED MEANING OF "FLASHLIGHT"

The term "flashlight" has been judicially determined to be a small, battery-operated, portable electric light. *Air-Sea Forwarders, Inc.* v. *United States*, 76 Cust. Ct. 268, C.D. 4665 (1976); *Biddle Purchasing Co.* v. *United States*, 48 Cust. Ct. 251, 257, C.D. 2345 (1962), *aff'd*, 50 CCPA 71, C.A.D. 823 (1963)

MULTIFUNCTION ARTICLES—CLASSIFICATION

It is well settled that a combination or multifunction article is not classifiable for tariff purposes under a specific statutory provision which describes only one of its features or functions as the importation is "more than" the article described. See *Robert Bosch Corp. et al.* v. *United States*, 63 Cust. Ct. 96, 103–104, C.D. 3881 (1969); *Dollar Trading Corp.* v. *United States*, 468 F. 2d 631, 60 CCPA 10, C.A.D. 1074 (1972); *United States* v. *Acec Electric Corporation*, 474 F. 2d 1009, 60 CCPA 113, C.A.D. 1091 (1973); *Fedtro, Inc.* v. *United States*, 449 F. 2d 1395, 59 CCPA 16, C.A.D. 1028 (1971). Although the power failure light has multifunctions, viz., to alert that there has been a power failure, as a stationary light source after a power failure, and as a portable light source, the power failure warning is its primary function. Consequently, it is more than a "flashlight" within the purview of TSUS item 683.70.

[Judgment for plaintiff.]

(Decided May 12, 1980)

Sharretts, Paley, Carter & Blauvelt, P. C. (*Peter Jay Baskin* at the trial; *Gail T. Cumins* with him on the brief) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Edmund F. Schmidt* at the trial; *Susan Handler-Menahem* on the brief), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of imported merchandise described on the invoices as "Power Failure Lights." The power failure lights were classified by the customs officials as flashlights under item 683.70 of the Tariff Schedules of the United States (TSUS). Consequently, they were assessed with duty at the rate of 35 per centum ad valorem.

Plaintiff protests that classification and, hence, the rate of duty assessed. It contends that the imported power failure light is not within the common meaning of the term "flashlight," and that, for customs classification purposes, it is more than a flashlight. Accordingly, plaintiff maintains that the merchandise is properly classifiable under the tariff item for "(e)lectrical articles * * * not specially provided for," item 688.40, TSUS, as modified by T.D. 68–9, with a rate of duty of only 5.5 per centum ad valorem.

Originally, plaintiff claimed alternative classifications as follows:

(a) "[V]isual signaling apparatus * * * electrical," under item 685.70, as modified by T.D. 68–9, at the rate of 4 per centum ad valorem;

(b) "Portable electric lamps with self-contained electrical source * * * Other," under item 683.80 at the rate of 13.75 per centum ad valorem; or

(c) "Illuminating articles * * * of base metal * * * Other," under item 653.39 at the rate of 19 per centum ad valorem.

Plaintiff, however, does not press for classification under these alternative claims.

Plaintiff maintains that the evidence clearly establishes that the power failure light has at least the following three functions: First, as a visual warning signal device; second, as a fixturelike illuminating device, i.e., as a stationary light source; and third, as a flashlight.

Plaintiff submits that unless this court determines that "all but one of the above functions were incidental functions," the power failure light is not classifiable under (a), (b), or (c) above since they "are not sufficiently diverse to encompass the imported article." Hence, plaintiff contends that TSUS item 688.40 is the only tariff provision which fully describes the power failure light with its multiple functions.

The following are the pertinent provisions of the tariff schedules:

Classified under:

	"Portable electric lamps with self-contained electrical source, and parts thereof:	
683.70	Flashlights and parts thereof.....	35% ad val."

Claimed under:

"688.40	Electrical articles, and electrical parts of articles, not specially provided for..	5.5% ad val."

It is conceded that the importations are portable; are illuminating articles not in chief value of brass; are electric; contain an electric light and self-contained electric source; and are not designed to be operated by propane or any other gas, or by compressed air, kerosene, or gasoline.

It is also conceded that when operating on direct current, the importations are used as small, battery-operated, portable electric lights for the purpose of illumination, and to provide a warning of alternating current failure, which defendant considers a subsidiary use. The direct current is supplied by a self-contained rechargeable battery. The defendant concedes that the pilot light may have a fugitive use to indicate that the self-contained batteries are being recharged, and that the alternating current is flowing. It also admits that in the event of alternating current power failure, the imported

330-630 O - 81 - 12

articles may be activated by the direct current supplied by the self-contained rechargeable battery.

It is agreed that the imported articles contain a relay and other necessary components which permit their operation on both alternating and direct current, and that the pilot light operates only on an external alternating current.

In essence, plaintiff maintains that the power failure light cannot be classified as a flashlight under TSUS item 683.70 because it incorporates or contains nonsubordinate or coequal features or functions, in addition to those which bring an article within the common meaning of the term "flashlight."

Defendant, on the other hand, contends that the merchandise has been properly classified as a flashlight, which it states has been judicially determined to be "a small, battery-operated, portable electric light." In support, it cites *Biddle Purchasing Co.* v. *United States*, 48 Cust. Ct. 251, 257, C.D. 2345 (1962), *aff'd*, 50 CCPA 71, C.A.D. 823 (1963), and *Air-Sea Forwarders, Inc.* v. *United States*, 76 Cust. Ct. 268, C.D. 4665 (1976). The defendant submits that any additional features possessed by the power failure light are subsidiary, subordinate, and incidental to its functioning as a flashlight.

Essentially, the question presented is whether the merchandise is a flashlight within the eo nomine provision for flashlights, as classified by the Customs officials, or whether it is something more than a flashlight, as claimed by plaintiff. It is the determination of the court that the plaintiff has overcome the presumption of correctness which attaches to the classification of the Customs officials 28 U.S.C. 2635 (a). Plaintiff has succeeded in establishing that the imported power failure lights were incorrectly classified as flashlights, and should be properly classified as "(e)lectrical articles * * * not specially provided for."

At trial, plaintiff called Mr. Hitoshi Kubo, manager of the appliance department, Lighting Products Manufacturing Division of Sanyo Electric Co., Ltd., Hyogo, Japan, the designer of the power failure light. It also called Mr. Morton M. Tillman, vice president of sales for Sanyo Electric Inc., located in Moonachie, N.J. Defendant's witness was Mr. Thomas H. Nicholl, president and owner of Nicholl Brothers, Inc., a domestic manufacturer of battery-powered portable lights.

Numerous exhibits, 13 for plaintiff and 15 for defendant, were received in evidence, including representative samples of the imported merchandise. Among the exhibits examined by the court were several power failure lights, a variety of flashlights, an emergency exit light, and a demonstrator.

The importations consist of two Sanyo power failure lights, both of which were designed by Mr. Kubo. He said that except for packaging,

they were identical. A small brochure in the box in which the merchandise was sold gives instructions as to its use. The following illustrations of the imported power failure lights are contained in the brochure:

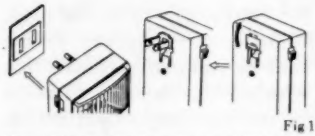

Fig 1

Note. Make sure that the switch is on CHG position.

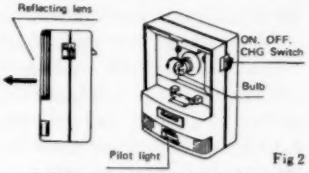

Fig 2

3. Make sure that the reflecting lens and its cover are properly replaced with the protruding grip on the bottom.

According to the brochure instructions, the built-in plug is inserted into a wall socket (fig. 1). By putting the switch in the upper (ON) position, the batteries are charged. A small pilot night light is lit while charging. Should there be a blackout, and the house current goes off, a relay will automatically switch on the power failure light.

Although the brochure states that "(t)o use as a portable flashlight, unplug the unit and switch on-off with the slide switch," Mr. Tillman, vice president of sales for Sanyo Electric Inc., explained that the statement was not consistent with his marketing approach. To recharge the batteries, the charging plug is pulled out from the rear of the unit and is plugged into an electric outlet (fig. 1).

An examination of the exhibits shows they are lightweight and can be held in the palm of the hand. Their dimensions are approximately 3½ inches high, 2½ inches wide and 1½ inches deep. The back and sides appear to be of plastic. Sanyo's frontal identification reads "Power Failure Lite." The descriptive wording on the back indicates the units are rechargeable. They have a plug in the back and a side switch designated "ON CHG OFF."

The picture of the model and advertising copy state that the "Power Failure Lite" is a night light, a power failure light and a conventional flashlight for use "during emergencies, anytime-anywhere."

Mr. Kubo described the importations as power failure lights which he had designed and developed. The witness characterized the use of Sanyo's power failure light as follows: (1) To notify or warn that there has been a power failure; (2) as a stationary light source after a power failure; and (3) to carry around after a power failure. Mr. Kubo stressed that the principal, primary intended purpose of these lights is notification of a power failure.

The witness testified that he had also designed Sanyo's rechargeable flashlights. They are used where there is no outlet, and for the purpose of lighting up something in the distance. The features of a power

failure light could not be built into the rechargeable flashlight as shaped. There is also a difference in charging time. The power failure light, when fully charged, operates for 50 minutes, and takes over 32 hours to recharge fully. The flashlights, on the other hand, emit light for 80 minutes and take 16 hours to recharge.

Mr. Tillman, vice president of sales for Sanyo, described the total concept of plaintiff's power failure light to be an emergency device in the event of power failure. He stated that his company presents this device as a power failure light, and as a safety device. The witnesss explained that when there is a power failure, the Sanyo light comes on automatically. Since it is sold for use in a living room, reception room, a doctor's or dentist's office, it is designed to fit unobtrusively into a wall socket, and must be as flush as possible against the wall.

Mr. Tillman differentiated between his company's power failure light and its rechargeable flashlight. The type of light emitted by the power failure light has a wide radius. The flashlight has a concentrated beam of light. The witness said that if there were a power failure during daylight, the power failure light would still function, even though illumination might not be needed. He described a power failure alarm made in Japan for the Oreck Corp. as the same in principle but a more sophisticated device audio in nature. The various Sanyo power failure lights, however, are strictly visual devices. Mr. Tillman testified that the primary function of both is to give warning of a power failure and/or interruption. He stated that, among other differences as to convenience and cost, the power failure lights are too bulky to use as substitutes for flashlights.

Defendant's witness, Mr. Nicholl, is president and owner of Nicholl Brothers, a domestic firm primarily engaged in the manufacture of battery-operated portable lights. The witness, an engineer, testified that he created most of the products that his company manufactures, and was generally familiar with flashlights that are marketed in this country.

Mr. Nicholl agreed with the Webster's Dictionary definition of a flashlight as "a small portable electric light with a self-contained electrical source." He described the importation as a flashlight. The witness agreed that it was a portable electric powered light. He did not consider either charging or operation time to be determinative as to whether a small portable electric light is a flashlight.

Mr. Nicholl described three of defendant's exhibits as flashlights of different shapes, one of which was intended to be mounted on a wall or in a car. He described his company's Dark Blazer PF2 power failure light, which was not as yet available on the market, as a portable rechargeable flashlight which would be marketed as a regular flashlight. The exhibit itself, however, bears the designation "Night Light."

The witness testified that the General Electric Security Light, a power failure light, was similar to the Dark Blazer PF2. His testimony in effect indicated that all flashlights are not night lights, and that a light can be both a flashlight and a power failure light.

As correctly stated by the defendant, the term "flashlight" has been judicially determined to be "a small, battery-operated, portable electric light." This court recently reaffirmed that definition in *Air-Sea Forwarders, Inc.* v. *United States*, 76 Cust. Ct. 268, C.D. 4665 (1976), wherein a plastic battery and switch case, and a metal cap with gooseneck extension and lamp socket, were classified under TSUS item 683.70 as flashlights. Plaintiff claimed proper classification under TSUS item 683.80 as other portable electric lamps. The evidence established that, after importation, the articles were assembled, equipped with a lens-end type bulb, and sold to purchasers who supplied "C" type batteries, and used them as inspection lights in small, inaccessible areas. Judge Richardson, in holding that the importations were within the broad, nonuse-oriented common meaning of "flashlight," stated:

> The imported article is a flashlight within the meaning of item 683.70, in the opinion of the court. Webster's Third New International Dictionary (1961), contemporaneous with the promulgation of the TSUS, defines the term flashlight as "a small battery-operated portable electric light." This definition, cited approvingly by this court in *Biddle Purchasing Co.* v. *United States*, 48 Cust. Ct. 251, 257, C.D. 2345 (1962), *aff'd*, 50 CCPA 71, C.A.D. 823 (1963), is expressive of the common meaning of the term flashlight. And it is to be noted that this definition is broad based, and is not circumscribed by usage or any physical devices as would influence usage. Hence, as the evidence in this record demonstrates, a wide variety of articles are bought, sold, and known as flashlights.
>
> With respect to the article in issue, there can be no doubt but that it fits comfortably within the ambit of the definition. It is small, battery-operated, and portable, and is, a fortiori, an electric light. The fact that the imported article is also known specifically as an inspection light does not change its character as a flashlight. This description only serves to emphasize its adaptation to a specific use, as is the case with other types of flashlights. It is, nevertheless, a species of flashlight. And the instant record makes abundantly clear the fact that within the trade and commerce of the United States the imported article and other articles of this class and kind are marketed as, and considered to be, inspection flashlights. (76 Cust. Ct. at 271–272.)

The defendant urges the application of the well settled principle of customs law that an eo nomine designation of an article includes all forms of the article, and asserts that the power failure light is merely an improvement of the basic flashlight. *T. M. Duche & Sons, Inc., et al.* v. *United States*, 44 CCPA 60, C.A.D. 638 (1957); *Crosse & Black-*

well Co. v. *United States*, 36 CCPA 33, C.A.D. 393 (1948); *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935).

After a careful examination of the imported power failure lights, all of the other exhibits, and the testimony of the witnesses, the court has concluded that the power failure lights are not embraced by the tariff designation "flashlight." The imported power failure light is neither a flashlight within the common meaning of the term, nor an improvement on a flashlight. It is a new article of commerce known as a power failure light.

In the *Air-Sea Forwarders, Inc.* case, the inspection light in the language of the court was "a species of flashlight." Indeed, in the trade and commerce of the United States, the articles were marketed and "considered to be, inspection flashlights." It is particularly noteworthy that although adapted to a specific use, the inspection flashlight performed but a single function. In the present case, however, the exhibits and the record leave no doubt that the power failure light has multiple functions. It is used to alert or warn that there has been a power failure, as a stationary light source after a power failure, and as a portable light source. Unlike the inspection light of the *Air-Sea Forwarders, Inc.* case, the power failure light at bar cannot be said to be a species of flashlight that "fits comfortably within the ambit of the definition."

Mr. Kubo distinguished the aims or purposes of the power failure light and those of a flashlight. He testified that in designing the power failure light, he had in mind its use primarily to alert that there had been a power failure. If a power failure occurred at night, the light can be carried for purposes of illumination. Mr. Kubo indicated, however, that it is better to keep the light in the outlet, even after a power failure, since the surrounding area would be lit up making it easier for people to move about. He added that, unlike the power failure light, the aim of a flashlight is to light up something in the distance, so that the light is focused as much as possible.

Plaintiff contends it has established that the power failure light with its multiple functions is properly classifiable under TSUS item 688.40 which embraces "(e)lectrical articles * * * not specially provided for." On the record before the court, it is clear that the power failure light is a multifunction article whose power failure warning feature cannot be considered subsidiary, subordinate or incidental to any function as a flashlight. It is well settled that, for tariff purposes, a combination or multifunction article is not classifiable under a specific statutory provision which describes only one of those features or functions since it is more than the article described. Consequently, the power failure light is more than a flashlight, as classified by the customs officials.

In *Robert Bosch Corp. et al.* v. *United States*, 63 Cust. Ct. 96, 103–104, C.D. 3881 (1969), this court described the "more than" principle of customs law as follows:

> The principle is well settled that where an article is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute. *Cragston Corporation* v. *United States*, 51 CCPA 27, C.A.D. 832 (1963); *United States* v. *The A. W. Fenton Company, Inc.*, 49 CCPA 45, C.A.D. 794 (1962); *Garrard Sales Corp.* v. *United States*, *supra* [35 CCPA 39, C.A.D. 369 (1947)]; and *Hirsch & Co. et al.* v. *United States*, 4 Ct. Cust. Appls. 82, T.D. 33365 (1913)."

The statement was expressly cited and relied upon by this court in *Dollar Trading Corp.* v. *United States*, 349 F. Supp. 1395, 1399, 67 Cust. Ct. 308, 314, C.D. 4290 (1971). The opinion in the *Dollar Trading Corp.* case was affirmed and adopted by the Court of Customs and Patent Appeals as its own. *Dollar Trading Corp.* v. *United States*, 468 F. 2d 631, 60 CCPA 10, C.A.D. 1074 (1972). See also *United States* v. *Acec Electric Corporation*, 474 F. 2d 1009, 60 CCPA 113, C.A.D. 1091 (1973); *Fedtro, Inc.* v. *United States*, 449 F. 2d 1395, 59 CCPA 16, C.A.D. 1028 (1971). Writing on the "more than" doctrine, the Court of Customs and Patent Appeals has stated that "each case must in the final analysis be determined on its own facts. See *United Carr Fastener Corp.* v. *United States*, 54 CCPA 89, C.A.D. 913 (1967), and the cases cited therein." *E. Green & Son* v. *United States*, 450 F. 2d 1396, 59 CCPA 31, C.A.D. 1032 (1971).

An application of the "more than" principle is found in *Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, C.D. 4433 (1973). In that case, battery-operated horn-lights, designed and used solely on the handlebars of bicycles, were classified as parts of bicycles under TSUS item 732.36. Plaintiff did not deny that the horn-lights were parts of bicycles, but claimed that the merchandise was also electrical sound or visual signalling apparatus and, by reason of general interpretative rule 10(ij), was classifiable under TSUS item 685.70. General interpretative rule 10(ij) provides that—

> A provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

The court found that although the horn portion of the combination article was an electrical sound signaling device, the light portion did more than merely serve as a signal in that it primarily functioned as an illuminating device. Consequently, the court determined that the horn-lights possessed an important illuminating feature at least

coequal to their signaling function, thus making them more than signaling apparatus, and held them to be properly classifiable as parts of bicycles.

Other cases which illustrate the "more than" doctrine are *Pollard Bearings Corporation* v. *United States*, 511 F. 2d 568, 62 CCPA 61, C.A.D. 1146 (1975) (fan and pump shaft bearings more than parts for water pumps); *Montgomery Ward & Co.* v. *United States*, 73 Cust. Ct. 187, C.D. 4573 (1974) (combination article containing a radio, phonograph and tape player, held more than a radio-phonograph).

In customs classification cases it has often been noted that a representative sample of the merchandise is a potent witness. *Karoware, Inc.* v. *United States*, 564 F. 2d 77, 65 CCPA 1, C.A.D. 1197 (1977); *United States* v. *The Twin Wintons*, 535 F. 2d 636, 63 CCPA 84, C.A.D. 1171 (1976). As stated in the *Oxford International* case, *supra*, "the character and design of the sample itself may compel a finding as to the primary use of the merchandise." 70 Cust. Ct. at 223. This principle is also equally applicable here. On all of the evidence presented, it is the determination of the court that plaintiff has met its burden of proving that the Government's classification of the imported merchandise as flashlights, within the purview of TSUS item 683.70, was erroneous. A careful examination reveals that the importations are essentially power failure lights with additional functions.

Having concluded that the importations are more than flashlights, the court must consider plaintiff's claim that the power failure lights are properly classifiable under TSUS item 688.40 as "(e)lectrical articles * * * not specially provided for." The evidence clearly establishes that the imported merchandise has at least three functions. It is a visual warning signal device, a fixturelike illuminating device (in that it was designed to function as a stationary light source), and a flashlight. The illuminating function makes the power failure light more than an article contemplated by TSUS item 685.70 which covers electrical visual signaling apparatus. The power failure warning device function and the flashlight function make the imported article more than an electric lamp under item 683.80, or an illuminating article under item 653.39.

Plaintiff maintains that the imported light is a unique article of special design and, consequently, is a new and distinct commercial article requiring a classification that encompasses more than one function and which most closely describes it as a single entity. The classification question in the case at bar is analogous to that in *Mattel, Inc.* v. *United States*, 76 Cust. Ct. 84, C.D. 4639 (1976). In *Mattel,*

articles invoiced as voice units, which were inserted into dolls and other objects to reproduce prerecorded sentences or sayings, were classified as parts of toys, not specially provided for, under TSUS item 737.90. They were claimed to be properly classifiable as phonographs under TSUS item 685.32. The court found that the imported voice unit had a permanently affixed interleaved record, which did not provide merely an auxiliary or incidental function but was at least of equal importance to the sound reproducing or phonographic portion of the article. In holding that the imported articles had been properly classified as parts of toys, Judge Maletz stated:

> Accordingly, it must be concluded that the article in controversy is not just another version or model of a phonograph. It is rather a new and distinct commercial entity containing the elements of both a phonograph and a record which, by reason of their special design and permanent attachment, have merged into a single unit possessing certain unusual, if not unique, features. Consequently, this new entity is something more than as well as other than the phonographs encompassed by item 685.32 and is not classifiable thereunder. See e.g., *United States* v. *A. W. Fenton Co.*, 49 CCPA 45, C.A.D. 794 (1962); *United States* v. *New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *United States* v. *Acec Electric Corp.*, 60 CCPA 113, C.A.D. 1091, 474 F. 2d 1009 (1973); *United States* v. *Howard Hartry, Inc.*, 60 CCPA 140, C.A.D. 1099, 477 F. 2d 1400 (1973). As our appellate court recently reiterated, merchandise which in fact constitutes more than a particular article is not classifiable as that article. *Pollard Bearings Corp.* v. *United States*, 62 CCPA 61, 64, C.A.D. 1146, 511 F. 2d 568, 571 (1975). See also e.g., *United States* v. *Flex Track Equipment Ltd.*, 59 CCPA 97, C.A.D. 1046, 458 F. 2d 148 (1972) * * *. 76 Cust. Ct. at 91.

The power failure lights do not provide merely an auxiliary or incidental function to the flashlight function. From an examination of the article, and the testimony of Mr. Kubo which the court finds credible and reliable, the court has concluded that the power failure warning function is its primary function or purpose. Even if the power failure warning function were to be at least a coequal nonilluminating function, it would still prevent classification under a provision which covers only one of those functions. See *The Ashflash Corporation* v. *United States*, 412 F. Supp. 585, 76 Cust. Ct. 112, C.D. 4643 (1976), and cases cited therein.

In *The Ashflash Corporation* case, the question presented pertained to the proper classification of blinker lanterns which had been classified as portable electric lamps under TSUS item 683.80. As in the present case, plaintiff claimed that they were properly classifiable as "(e)lectrical articles * * * not specially provided for" under TSUS item 688.40. In sustaining plaintiff's claim, the court held that the blinker

lanterns were portable battery-operated combination articles comprised of a searchlight portion for illumination, and an automatic signal-warning red flasher for emergency signaling; that the imports served two independent and coequal functions, as a searchlight and as a signal-warning flasher; and that the latter function was not incidental, auxiliary or subordinate to the searchlight function. The blinker lanterns, therefore, were more than the portable electric lamps covered by item 683.80, as classified. Consequently, as combination or multifunction articles they were properly classifiable and dutiable as electric articles not specially provided for under item 688.40, as claimed.

In an earlier case, *Fedtro, Inc.* v. *United States*, 376 F. Supp. 1398, 72 Cust. Ct. 267, C.D. 4548 (1974), the question presented was whether a CH–ACD battery charger was merely a rectifying apparatus, as classified under TSUS item 682.60, or whether, as urged by plaintiff, its testing element removed it from that classification because it was more than a rectifying apparatus. In *Fedtro*, again classification was claimed under item 688.40, TSUS, as "(e)lectrical articles * * * not specially provided for." The court found that the battery charger performed the dual functions of testing and charging batteries. Hence, it was established that it had a use in addition to its use as a battery charger. In holding that the merchandise was therefore properly dutiable under item 688.40, as claimed by plaintiff, Judge Newman stated:

> To reiterate, according to the operating instructions, 1.5 volt batteries should first be tested to determine whether or not they are rechargeable, which prevents one from attempting to recharge "dead" or fully charged batteries. This procedure points up that there are circumstances when the testing feature would be utilized, but the charging feature would not be utilized. Additionally, the testing feature indicates whether a battery requires merely a "booster" charge or a full charge, and such feature reveals whether the recharge was effective. Thus, it is evident, that the tester and charger complement each other. Plainly, then, the testing element of the CH–ACD battery charger (which does not convert a.c. to d.c.) is indeed a highly significant feature of the article and, * * * makes the article something more than "rectifying apparatus." The cases relied upon by the Government, cited *supra*, have been carefully considered, but as I do not view the testing feature as merely incidental or auxiliary, those cases are not deemed controlling relative to the present merchandise. Since there is no dispute that the merchandise is electrical, it is properly dutiable under the provision in item 688.40, TSUS for electrical articles, not specially provided for, as claimed by plaintiff. 72 Cust. Ct. at 275.

The power failure light is an electrical multifunction article. In accordance with the foregoing cases, it is clear that it is classifiable

under TSUS item 688.40 as "(e)lectrical articles * * * not specially provided for."

Although plaintiff has met its burden of proof, the defendant contends that a claim under a "not specially provided for" clause itself imposes upon plaintiff a burden of proof to establish prima facie that the article is in fact not provided for elsewhere. Furthermore, the defendant asserts that that burden cannot be discharged simply by establishing that the article is described by the remainder of the language of the "not specially provided for" provision. The court disagrees, and adopts the view expressed by Judge Newman, who, in rejecting a similar contention in *E. R. Squibb & Sons, Inc.* v. *United States*, 75 Cust. Ct. 193, C.R.D. 75–7 (1975), wrote:

> It is, of course, fundamental that plaintiff has the burden of establishing not only that the Government's classification is erroneous, but also of establishing that the claimed classification is correct. *United States* v. *L. Batlin & Son, Inc.*, 61 CCPA 17, C.A.D. 1111, 487 F. 2d 916 (1973); *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). However, I am unable to agree with defendant's contention that plaintiff has the burden of negating the possible applicability of tariff provisions, other than item 750.40 merely because item 688.40 contains a "not specially provided for" clause. In *Pacific Fast Mail* v. *United States*, 68 Cust. Ct. 41, 49, C.D. 4333, 338 F. Supp. 506 (1972), the court rejected a similar contention by defendant, holding that where the plaintiff has presented a prima facie showing that the Government's classification is erroneous and the claim of the protest is correct, the defendant is charged with the burden of going forward with proof to negate plaintiff's case, either by showing that plaintiff's proof is insufficient or by proving that a more appropriate alternative provision is applicable. And cf. *L. Batlin & Son, Inc., supra.*
>
> Accordingly, if the Government's classification in this case is proven erroneous, and if plaintiff establishes the applicability of the claimed provision, the burden of proof shifts to defendant to affirmatively establish the propriety of any asserted alternative classification. However, defendant has not asserted any alternative classification in its answer. Consequently, there is no issue concerning any alternative classification before the court. 75 Cust. Ct. at 195–196.

In view of the foregoing, it is the determination of the court that the imported power failure lights have been erroneously classified as flashlights, and are properly classifiable under TSUS item 688.40, as modified, as "(e)lectrical articles * * * not specially provided for," with duty at the rate of 5.5 per centum ad valorem.

Judgment will be entered accordingly.

(C.D. 4856)

SIEMENS AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Surge Voltage Protectors

Consolidated Court No. 72-5-01093

APPARATUS BASED ON THE USE OF RADIATIONS FROM RADIOACTIVE SUBSTANCES—ITEM 709.66, TSUS—"BASED ON"

Congress, by using the words "based on" in item 709.66, TSUS intended to embrace apparatus in which radiation from radioactive substances is its sine qua non, viz, the radioactive substance must be a fundamental and essential element or constituent of the apparatus.

SAME—GAS TUBE SURGE VOLTAGE PROTECTORS

The record fails to establish that the radioactive substance contained in the imported gas tube surge voltage protectors constitutes a fundamental and essential element or constitutent of the devices. Although plaintiff proved that the radioactive substance preionizes the inert gas in the tubes and helps stabilize the breakdown voltage, the evidence further shows that the gas ionizes when voltage is applied irrespective of the presence of a radioactive material; that breakdown voltage is determined primarily by the electrode spacing and gas fill pressure, rather than radiation; that many SVP tubes are manufactured without radioactive materials; and that the inclusion of a radioactive substance in the present tubes was not essential to their basic function of overvoltage protection. Under these facts and circumstances, the court finds that the imports are not classifiable under item 709.66, TSUS, as apparatus based on the use of radiations from radioactive substances. Cf. *Pharmacia Laboratories, Inc.* v. *United States*, 67 CCPA —, C.A.D. 1235, 609 F. 2d 491 (1979).

COMMON MEANING

In the absence of a special commercial designation the language of a tariff statute is to be construed in accordance with its common meaning. Moreover, the common meaning of a tariff term is a matter of law to be determined by the court; and in making such determination, the court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. Further, the testimony of witnesses respecting common meaning is advisory only and has no binding effect on the court. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *United States* v. *E. Besler & Company et al.*, 64 CCPA 121, 124, C.A.D. 1193, 557 F. 2d 270 (1977); *United States* v. *Corning Glass Works*, 66 CCPA 25, C.A.D. 1216, 586 F. 2d 822 (1978); *Ozen Sound Devices* v. *United States*, 67 CCPA —, C.A.D. 1246, 620 F. 2d 880 (1980).

SAME—TECHNICAL TERMS

Where the common meaning of a technical term is in issue, reliance should not be confined to general lexicons, but technical dic-

tionaries should be consulted. *Brown Boveri Corp. et al.* v. *United States*, 53 CCPA 19, C.A.D. 870 (1966); *United States* v. *The Spiegel Bros. Corp.*, 51 CCPA 69, C.A.D. 839 (1964); *Firth Sterling, Inc.* v. *United States*, 48 CCPA 130, C.A.D. 779 (1961); *F. W. Woolworth Company* v. *United States*, 67 Cust. Ct. 9, C.D. 4245 (1971).

COMMON MEANING—"ELECTRON TUBE"—ITEM 687.60, TSUS

The lexicographic authorities relied upon by plaintiff define "electron tube" in terms of rudimentary but essential features: an airtight enclosure, evacuated or gas-filled, providing a medium for the flow and conduction of electrons between two electrodes. The SVP tubes satisfy these basic criteria of an electron tube.

EO NOMINE DESIGNATION—SCOPE OF

An eo nomine designation without limitation includes all forms of the article. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961). Hence, the eo nomine provision for electronic tubes in the superior heading to item 687.60 includes all forms of such tubes.

RELATIVE SPECIFICITY—GENERAL INTERPRETATIVE RULE 10(c)

Under rule 10(c), the provision that more specifically describes the SVP tubes is "the item having requirements which are 'more difficult to satisfy'." *F. L. Smidth & Company* v. *United States*, 56 CCPA 77, 85, C.A.D. 958, 409 F. 2d 1369 (1969); *Ozen Sound Devices* v. *United States*, 67 CCPA —, C.A.D. 1246, 620 F. 2d 880 (1980). The eo nomine provision for "electronic tubes" in item 687.60, TSUS, is plainly more restrictive and "difficult to satisfy" than the provision for "apparatus * * * for the protection of electrical circuits" in item 685.90, TSUS.

[Judgment for plaintiff.]

(Decided May 13, 1980)

Freeman, Meade, Wasserman & Schneider, Esqs. (Messrs. *Louis Schneider* and *Kenneth Nathan Wolf* of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *Madeline B. Kuflik*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge: In these consolidated cases, plaintiff challenges the classification by Customs of certain gas tube surge voltage protectors (SVP's) exported from West Germany on various dates from 1969 to 1978, and entered at the port of New York.

The merchandise in issue was classified under the provision in item 685.90 of the Tariff Schedules of the United States (TSUS) for "other electrical apparatus * * * for the protection of electrical circuits" and assessed duty at the rate of 14, 12, 10, or 8.5 per centum ad valorem, depending upon the year of entry, pursuant to T.D. 68–9. Plaintiff claims that the imports are properly dutiable under the provision in item 709.66, TSUS, for "Apparatus based on the use of radiations from

radioactive substances" at the rate of 9.5, 8, 7, or 6 per centum ad valorem, depending upon the year of entry, pursuant to T.D. 68–9.[1] Alternatively, plaintiff claims that the merchandise is dutiable as *other* electronic tubes under item 687.60, TSUS, at the rate of 10, 8.5, 7, or 6 per centum ad valorem, depending upon the year of entry, pursuant to T.D. 68–9.

Plaintiff's alternative claim under item 687.60, TSUS, is sustained, for the reasons indicated hereinafter.

STATUTES INVOLVED

Tariff Schedules of the United States, 19 U.S.C. 1202:

Classified under:

Schedule 6, Part 5.—Electrical Machinery and Equipment:

Part 5 headnotes:

1. This part does not cover—

* * * * * * *

(vi) electrical instruments and apparatus provided for in schedule 7.

* * * * * * *

685.90	Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof	[14, 12, 10, or 8.5% ad val., depending on the year of entry]

[1] Plaintiff (brief, p. 8, n. 3) has abandoned this claim respecting SVP tube No. A52–C350X.

Claimed under:

Schedule 7, part 2, subpart B.—Medical and Surgical Instruments and Apparatus; X-Ray Apparatus:

* * * * * * *

Apparatus based on the use of X-rays or of the radiations from radioactive substances, whether for medical, industrial, or other uses, and parts thereof:

* * * * * * *

709.66	Apparatus based on the use of radiations from radioactive substances, and parts thereof	[9.5, 8, 7, or 6% ad val., depending on the year of entry]

Alternatively claimed under:

Schedule 6, part 5.—Electrical Machinery and Equipment

* * * * * * *

Electronic tubes (except X-ray tubes); photocells; transistors and other related electronic crystal components; mounted piezo-electric crystals; all the foregoing and parts thereof:

* * * * * * *

687.60	Other	[10, 8.5, 7, or 6% ad val., depending on the year of entry]

THE FACTS[2]

The SVP's in issue are hermetically sealed gas discharge tubes consisting of two electrodes, a glass insulator filled with argon (an inert gas), and a minute quantity of promethium 147 (a radioactive

[2] The record consists of two witnesses for plaintiff: Uwe Renken (plaintiff's import-export traffic manager) and Ludwig Rademacher (plaintiff's production manager in Sonora, Mexico) plus 10 exhibits; and 3 witnesses for defendant: Richard Knapp (an electrical engineer and supervisor of special services at New York Telephone), Lewis Douglas Sweeney (sales manager for Joslyn Electronics, a supplier of surge voltage protectors, and formerly plaintiff's operations manager for surge voltage protectors and mylar capacitors), and Leonard Strauss (professor of electrical engineering and electrophysics at the Polytechnic Institute of New York) plus 3 exhibits.

material). In the electronics field, SVP tubes are called cold cathode tubes, gas discharge tubes and gas spark gap tubes (R. 38). The function of the subject SVP tubes is to provide a conductive path for unwanted and excessive voltage transients,[3] thereby preventing the transient energy and associated voltages from damaging electric circuitry and causing harm to personnel.

SVP's are designed to switch rapidly at a specific voltage level, referred to as the breakdown voltage, from a nonconductive state to a conductive state when subjected to an excessive voltage transient. As the voltage across an SVP tube increases, ionization of the inert gas occurs and the tube becomes conductive. The flow of electrons within the tube cannot be controlled. Promethium 147, a radioactive material contained within the instant tubes (except tube No. A52–C350X), emits beta particles (radiation) which preionize or facilitate the ionization of the gas in the tubes and stabilize the breakdown voltage. However, the breakdown voltage is a design parameter controlled primarily by the electrode spacing and gas fill pressure of the SVP tubes, and there are many surge-protective tubes manufactured without radioactive materials.

QUESTION PRESENTED

Are the imported SVP's properly classifiable under either item 709.66, TSUS, or item 687.60, TSUS, as alternatively claimed by plaintiff?

OPINION

I

Since the record clearly establishes that the SVP tubes are used for the protection of electric circuits[4] (R. 54, 172–173, 192, defendant's exhibit A), the merchandise is described in item 685.90, TSUS, as classified by Customs. However, classification under item 685.90 is precluded by headnote 1(vi) of schedule 6, part 5 if the merchandise is described in item 709.66, TSUS, the provision primarily claimed by plaintiff to be applicable.

To be classifiable under item 709.66, the SVP tubes must be "based on the use of radiations from radioactive substances". As noted *supra*, the imported tubes contain the radioactive substance promethium 147 (R. 36–37, 146). Nevertheless, I have concluded that the imports are not based on the use of radiations from radioactive substances.

[3] These voltage transients are generated by both natural and manmade sources, such as lightning, interruption of current in motors, transformers, solenoids and relays, powerline shorts and other sources (defendant's exhibit B, p. 2).

[4] The fact that the SVP's are used for the protection of electric circuits is conceded in plaintiff's exhibit 4 (p. 2), a letter from plaintiff's former counsel to the Bureau of Customs (now Customs Service) requesting a classification ruling for the tubes.

In Webster's New International Dictionary (2d ed. 1957), the word "base" is defined as:

> 2. Figuratively, the fundamental or essential part of a thing; essential principle; groundwork. * * * 4. a. The main or chief ingredient of anything, viewed as its fundamental element or constituent.

Thus, the language "based on" as contained in item 709.66 evinces congressional intent to embrace merchandise in which radiation from radioactive substances is its sine qua non.[5] I find that radiation is not the sine qua non of the SVP tubes in issue, since the promethium 147 is not a fundamental and essential constituent of these tubes.

The record is clear that the specific function of the subject SVP tubes is to provide a conductive path for excessive voltage transients, and that such function of overvoltage protection is not based upon the use of a radioactive material (R. 51–52, 194). Promethium 147, the radioactive component in the imported tubes, preionizes the gas in the tubes [6] and stabilizes the breakdown voltage [7] (R. 125–126, 137, 147–148, 170, 193, 198–199, 214, 226). Nevertheless, the unrebutted testimony of defendant's expert witnesses shows that the gas in the SVP tubes ionizes when voltage is applied, irrespective of the presence of a radioactive substance (R. 171–172, 227–228), and that speed of ionization and a specific breakdown voltage can be achieved by means other than the use of radioactive substances. Defendant's witnesses testified, without contradiction or rebuttal, that breakdown voltage in the SVP tubes is determined primarily by the electrode spacing and the gas fill pressure, rather than radiation (R. 126–127, 191, 194–195, 198–200, 202, 212). Significantly, that testimony is corroborated by plaintiff's own promotional brochure (defendant's exhibit B, p. 2), which states:

> The DC breakdown voltage is a design parameter controlled by the manufacturer, and *is a function primarily of the electrode spacing and the gas fill pressure.* [Italic added.]

Similarly, plaintiff's exhibit 12, a technical data sheet concerning Joslyn miniature gas-tube surge protectors, reads:

> When a surge exceeds the breakdown voltage of the tube (surge sparkover voltage), the gap becomes intensively ionized, and conduction takes place within a fraction of a microsecond.

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[5] See the discussion of apparatus based on the use of radiations from radioactive substances in the Summaries of Trade and Tariff Information (1970), schedule 7, vol. 2, p. 95.

[6] The promethium 147 provides a certain level of energy to the gas which merely increases the speed of ionization (R. 198–199). This function of the radioactive material is analogous to the function of a catalyst in a chemical reaction. (See plaintiff's exhibit 3, p. 2.)

[7] In technical terms, the D.C. breakdown voltage is defined as: "The voltage at which an abrupt transition of the gap resistance from a practically infinite value (>10,000 megohm) to a relatively low value (approximate 0 Ohm) occurs, when subject to a slowly rising voltage (1,000 V/sec or less)". (Defendant's exhibit B, p. 7.) More simply stated, the breakdown voltage is "the point at which the gas turns from a nonconductive to a conductive state" (R. 124).

> The ionized protector becomes a short circuit and remains so until the voltage returns to normal. *Ionization and deionization are extremely fast due to the type of gas fill and physical configuration used.* [Italic added.]

Like the Siemens tubes in issue, the Joslyn tubes described in plaintiff's exhibit 12 contain a radioactive material (tritium) (R. 164–166). However, the radioactive component of the Siemens and Joslyn tubes is not mentioned in the descriptive promotional literature (defendant's exhibit B and plaintiff's exhibit 12). Hence, it is evident that neither plaintiff nor Joslyn regarded the radioactive component of its tubes as an important feature.

Concededly, there are many SVP tubes manufactured without radioactive materials. For example, plaintiff admits (reply brief, p. 2, n. 1) that SVP tube model No. A52–C in entry No. K213581 does not contain any radioactive material. Moreover, defendant's exhibit C, the IEEE Standard Test Specifications for Gas Tube Surge-Protective Devices (1977), published by the Institute of Electrical and Electronics Engineers, Inc., states (at p. 7):

> 3.2.3 Radiation. *Some* devices *may* contain irradiated material; when these are used in nuclear facilities, special consideration may be necessary. [Italic added.]

This statement clearly demonstrates that only some gas tube surge-protective devices utilize radioactive substances. Significantly too, the definition of "gas tube surge arrester" found in the IEEE test specifications (exhibit C, p. 6) does not even mention or imply the use of radiation (R. 133). Plainly, then, the inclusion of a radioactive substance in the present SVP tubes was not essential to their basic function of over-voltage protection.

As analogous to the situation presented in the instant case, defendant calls attention to *Pharmacia Laboratories, Inc.* v. *United States*, 67 CCPA —, C.A.D. 1235, 609 F. 2d 491 (1979), wherein the sole issue presented was whether certain imported radioimmunoassay diagnostic test kits were classifiable as "usefully radioactive compounds" under item 494.50, TSUS. Citing Judge Watson's finding that the kits contained nonradioactive components which were as important as the radioactive component, Chief Judge Markey concluded that the kits could not be classified under item 494.50. Here, respecting even the characteristic of breakdown voltage, the record shows that electrode spacing and gas fill pressure are the primary determinants.

In sum, plaintiff's proof that the imported SVP tubes utilize a radioactive material is not sufficient to sustain its burden of proof under item 709.66 absent further evidence showing that the radioactive material is a fundamental and essential component of the merchandise. In the present case, it would require a substantial

magnification of the role played by the promethium 147 to find that the SVP tubes are "based on the use of radiations from radioactive substances," within the purview of the statute. Accordingly, plaintiff's primary claim under item 709.66, TSUS, is without merit.

II

We now turn to plaintiff's alternative claim that the merchandise falls within the eo nomine provision for electronic tubes in item 687.60, TSUS.

Fundamentally, in the absence of a special commercial designation, the language of a tariff statute is to be construed in accordance with its common meaning. Moreover, the common meaning of a tariff term is a matter of law to be determined by the court; and in making such determination, the court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. Further, the testimony of witnesses respecting common meaning is advisory only and has no binding effect on the court. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *United States* v. *E. Besler & Company et al.*, 64 CCPA 121, C.A.D. 1193, 557 F. 2d 270 (1977); *United States* v. *Corning Glass Works*, 66 CCPA —, C.A.D. 1216, 586 F. 2d 822 (1978); *Ozen Sound Devices* v. *United States*, 67 CCPA —, C.A.D. 1246, 620 F. 2d 880 (1980).

As indicative of the common meaning of the term "electronic tube", defendant quotes the following definitions:

Brittania World Language Dictionary, volume 51 at p. 407:

> Electron tube is a high vacuum tube in which a stream of electrons is emitted from a heated cathode and subjected to the controlling action of a grid which amplifies and directs the current.

Webster's Third New International Dictionary, Unabridged (1963):

> An electronic device in which conduction by electrons takes place through a vacuum or a gaseous medium between a sealed glass or a metal container, and which has various uses (as amplification of electrical energy and the conversion of alternating current to direct current and vice versa) that are based on the controlled flow of electrons.

Predicated upon the above-quoted definitions and the testimony of its expert witnesses, defendant urges that the SVP's are not electron tubes [8] within the common meaning of that term since the imports do not control the flow of electrons and they do not perform the varied functions of amplification, conversion, rectification, etc. In essence,

[8] As correctly pointed out by plaintiff, the terms "electronic tubes", as set forth in item 687.60, TSUS, and "electron tubes" are interchangeable. See Markus, Electronics Dictionary (4th ed. 1978), p. 218-219.

defendant maintains that the scope of item 687.60 is restricted to those devices which perform the functions and have the physical configuration stated in the definitions submitted.

Plaintiff, in support of its contention that the SVP's fall within the common meaning of "electron tube", has cited definitions of that term set forth in several technical lexicographic authorities, which definitions are broader in application than the restrictive definitions proffered by defendant. The field of electronics is, of course, a technical one, and therefore the common meaning of the tariff term "electronic tube" should be determined in that context. A long line of authorities teaches that in instances where the common meaning of a technical term is in issue, as here, reliance should not be confined to general lexicons, but technical dictionaries should be consulted. *Brown Boveri Corp. et al.* v. *United States*, 53 CCPA 19, C.A.D. 870 (1966); *United States* v. *The Spiegel Bros. Corp.*, 51 CCPA 69, C.A.D. 839 (1964); *Firth Sterling, Inc.* v. *United States*, 48 CCPA 130, C.A.D. 779 (1961); *F. W. Woolworth Company* v. *United States*, 67 Cust. Ct. 9, C.D. 4245 (1971).

As noted supra, the record shows that the SVP tubes are known as cold cathode tubes, gas discharge tubes and gas spark gap tubes (R. 38, 93, 197). Technical authorities provide the following pertinent definitions:

IEEE Standard Dictionary of Electrical and Electronics Terms (2d ed. 1977):

> *Electron tube.*—An electron device in which conduction by electrons takes place through a vacuum or gaseous medium within a gas-tight envelope. * * *
>
> *Cold-cathode tube.*—An electron tube containing a cold cathode.
>
> *Gas tube.*—An electron tube in which the pressure of the contained gas or vapor is such as to affect substantially the electrical characteristics of the tube.

Modern Dictionary of Electronics (4th ed. 1972):

> *Electron tube.*—An electron device in which the electrons move through a vacuum or gaseous medium within a gas-tight envelope.
>
> *Cold-cathode tube.*—An electron tube containing a cathode which will emit electrons without being heated.
>
> *Gas tube.*—A partially evacuated electron tube containing a small amount of gas. Ionization of the gas molecules is responsible for the current flow.

Dictionary of Science and Technology (1971):

> *Electron tube or valve (electronics).*—In United States, any electron device in which the electron conduction is in a vacuum or gas-tight enclosure.

Markus, Electronics Dictionary (4th ed. 1978).

> *Electron tube.*—An electron device in which conduction of electricity is provided by electrons moving through a vacuum or gaseous medium within a gastight envelope. A tube may provide rectification, amplification, modulation, demodulation, oscillation, limiting, *and a variety of other functions.* Examples include cathode-ray tubes, gas tubes, phototubes, and vacuum tubes.

> Also called electronic tube, radio tube, tube, and valve (British). [Italic added.]

In addition to the foregoing definitions in technical authorities, plaintiff cites the following definition in the Random House Dictionary of the English Language (Unabridged 1966 ed.):

> *Electron tube.*—See vacuum tube.
> *Vacuum tube.*—* * * 2. A sealed glass tube containing a partial vacuum or a highly rarefied gas, in which may be observed the effects of a discharge of electricity passed through the tube between electrodes leading into it. Also called electron tubes; * * *.

The lexicographic authorities relied upon by plaintiff define "electron tube" in terms of rudimentary but essential features: an airtight enclosure, evacuated or gas-filled, providing a medium for the flow and conduction of electrons between two electrodes. Plainly, the SVP tubes satisfy these basic criteria of an electron tube (R. 38). Equally important, the record establishes that the imports are cold cathode tubes, which by definition are electron tubes.

At the trial, defendant's witness Strauss testified that there are many types of electron tubes (R. 202), and it is well settled that an eo nomine designation without limitation includes all forms of the article. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961). Hence, the eo nomine provision for electronic tubes, in the superior heading to item 687.60, includes all forms of such tubes.

III

To recapitulate briefly, the SVP tubes are clearly described in the TSUS as both "apparatus * * * for the protection of electrical circuits" under item 685.90, and as electronic tubes under the superior heading to item 687.60. Thus, an issue of relative specificity of the two competing provisions is posed by virtue of General Interpretative Rule 10(c) which, so far as pertinent, reads:

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; * * *.

In *F. L. Smidth & Company* v. *United States*, 56 CCPA 77, 85, C.A.D. 958, 409 F. 2d 1369 (1969), the Court of Customs and Patent Appeals construed the above-quoted statutory rule of relative specificity as follows:

> This (interpretative rule) appears to us to mean this: if an article is determined to be clearly described in two or more (tariff schedule) items, selection of the controlling item by relative specificity is mandatory and takes precedence over other judge-evolved methods of resolving ambiguity, including resort to extrinsic aids such as legislative history.

Under rule 10(c), the provision that more specifically describes the SVP tubes is "the item having requirements which are 'more difficult to satisfy'." *Smidth, supra*, 56 CCPA at 85; *Ozen Sound Devices, supra*. The eo nomine provision for electronic tubes is undoubtedly more restrictive and difficult to satisfy than the provision for "apparatus * * * for the protection of electrical circuits". Electronic tubes, although performing a variety of functions, are essentially one kind of device. Apparatus for the protection of electrical circuits, on the other hand, are comprised of a number of highly diverse devices, such as fuses (R. 172, 179, 206), circuit breakers, lightning arresters (R. 85), insulators, transformers (R.181–182), carbon block assemblies (R. 76, 96), carbon arresters (R. 121, 168), gas tubes, neon bubbles (R. 84, 172), zener diodes, varistors, selenium rectifiers (R. 168), etc. Such heterogeneous devices perform different functions in circuit protection, and have no common physical criteria.

United States v. *Ampex Corp. et al.*, 59 CCPA 134, C.A.D. 1054, 460 F. 2d 1086 (1972) is somewhat analogous to the instant case respecting the issue of relative specificity. There, the competing provisions were item 685.20 (television apparatus) and item 688.15 (insulated electrical conductors). Addressing the issue of relative specificity, the appellate court commented (59 CCPA at 137):

> On that issue (relative specificity), we agree with dissenting Judge Newman that:
>
> Insulated electrical conductors, *although taking a variety of forms*, are essentially one kind of device. Television apparatus, on the other hand, is comprised of an *entire group of varied kinds of devices* * * *. [Italic added.]

And *cf. Stella D'Oro Biscuit Co., Inc.* v. *United States*, 79 Cust. Ct. 28, C.D. 4709 (1977), *aff'd per curiam*, 65 CCPA 52, C.A.D. 1205, 570 F. 2d 945 (1978).

IV

Finally, plaintiff contends that the SVP tubes are properly classifiable under item 687.60, TSUS, on the basis that there was an established and uniform practice by Customs of classifying the tubes under that provision, which practice was changed without the requisite notice in contravention of 19 U.S.C. 1315(d).[9] Additionally, plaintiff relies upon the doctrine of stare decisis and cites three abstract decisions of the Customs Court holding that the SVP tubes were

[9] In support of its claim under 19 U.S.C. § 1315(d), plaintiff introduced in evidence a letter from the Bureau of Customs (now Customs Service) dated July 25, 1970 ruling that the SVP tubes are classifiable as electronic tubes under item 687.60 (plaintiff's exhibit 3), and also the testimony of its witness Renken that approximately 100 shipments entered by plaintiff over a 2-year period were classified and liquidated by Customs under item 687.60 (R. 16). Plaintiff argues that the challenged assessments under item 685.90 constitute the imposition of a higher rate of duty than the Secretary of the Treasury had found applicable to the merchandise under an established and uniform practice without the notice required by the statute.

properly dutiable under item 687.60 rather than item 685.90. Abstracts P73/89, P73/104, and P73/121 (70 Cust. Ct. 393, 396 and 399 (1973)). These three cases were submitted by the parties on an agreed statement of facts and the classification under item 687.60 was conceded by defendant without trial or briefing.

Since I agree with plaintiff's arguments that the common meaning of electronic tubes embraces the SVP's in issue and that item 687.60 is more specific than item 685.90, there is no need to address the issues raised by plaintiff concerning the Government's alleged change in administrative practice in classifying the SVP tubes under item 687.60 and stare decisis.

CONCLUSION

For the reasons stated herein, plaintiff's alternative claim under item 687.60, TSUS, is sustained, but plaintiff's primary claim under item 709.66, TSUS, is dismissed. Judgment will be entered accordingly.

(C.D. 4857)

DAVID E. PORTER, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Seats for Rapid Transit Cars—Furniture—Parts for Rail Vehicles

Court No. 76-6-01448

(Dated May 21, 1980)

Arter Hadden & Hemmendinger (*Barry E. Cohen* and *Richard S. Green* on the memorandum) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Madeline B. Kuflik* on the memorandum), for the defendant.

LANDIS, Judge: Pursuant to the per curiam order of the Court of Customs and Patent Appeals remanding this cause to this court to reconsider plaintiff's motion to amend judgment and for further proceedings, this court has reconsidered plaintiff's said motion, previously dismissed, and adhered to its earlier ruling. On its own motion, in view of the defendant's recent memorandum filed March 28, 1980, stating in substance there are no differences for classification purposes in the seats therein involved and listed on plaintiff's invoices, the previous judgment of this Court in *David E. Porter* v. *United States*, 82 Cust. Ct. 259, C.D. 4808, 475 F. Supp. 688 (1979), is now amended as stated herein and in the attached order amending judgment. Further background for this opinion may be found in a Customs rules decision with the same title, at 83 Cust. Ct. 166, C.R.D. 79-16 (1979).

Briefly restated, the facts are these: On June 22, 1979, on cross-motions for summary judgment, the Court concluded, in a written opinion and decision, that the merchandise in issue viz: "transverse rapid transit seats used exclusively in San Francisco Bay Area Rapid Transit (BART) rail vehicles," 82 Cust. Ct. at 260 (italic supplied), should be classified as parts of rail vehicles (TSUS item 690.40) rather than as furniture as classified by Customs (TSUS item 727.55).

Forty-six days after decision and judgment and eight days prior to defendant's appeal, to wit: on August 7, 1979, plaintiff moved, pursuant to Customs Court rule 12.2 for an order amending the June 22, 1979 judgment entered in plaintiff's favor. As this court noted in C.R.D. 79–16, the crux of plaintiff's argument appeared in one paragraph:

> Upon review of the Court's decision and the entry papers in this case, *counsel belatedly recognizes an oversight* in the merchandise described *in its summary judgment motion.* Although the merchandise embraced by the entries in litigation include transverse seats, window seats (both of which are mounted at a right angle to the direction of travel), and longitudinal seats (mounted in the direction of travel), *plaintiff's motion inadvertently addressed only the transverse seats. It should have included the window and longitudinal seats, as these are similar in design* to the transverse seats and are exclusively dedicated as parts of the BART rail vehicle. * * * (Plaintiff's motion to amend judgment, pp. 2–3.) [*Emphasis* supplied.]

The defendant responded that the plaintiff's appellation of its motion, as a motion to amend judgment, was incorrect. In its opposition, the defendant argued:

> * * * The relief sought by plaintiff is for the court to broaden its decision in C.D. 4808 to include merchandise which was not included or considered in the original motion, even though plaintiff had the opportunity to seek adjudication of the classification of the other seats in the original motion. * * * The relief sought is more than the mere correction of a clerical error. It is a matter of substance affecting the substantial rights of the parties. * * * " (Defendant's opposition to plaintiff's motion to amend judgment, pp. 2–3.)

Defendant urged that the plaintiff's motion actually constituted a motion for rehearing. So perceived, the motion would have to be dismissed as untimely since by statute, a rehearing in this Court must be sought not later than 30 days after entry of judgment. See 28 U.S.C. 2639 and also Customs Court rule 12.1(a), both of which are set out in C.R.D. 79–16. On September 13, 1979, this court ordered that the plaintiff's motion be dismissed as it "was plainly improper for many reasons." See 83 Cust. Ct. at 169, C.R.D. 79–16.

Further procedural motions are detailed in C.R.D. 79–16; for present purposes, the next significant event occurred on October 4, 1979,

when plaintiff cross-appealed to the Court of Customs and Patent Appeals (appeal 80–1) seeking review of the September 13 order.

On February 25, 1980, the Court of Customs and Patent Appeals entered the following per curiam order:

> The court has considered David E. Porter's motion for summary reversal in Customs appeal No. 80–1 and motion to dismiss Customs appeal No. 79–30, the Government's motion to dismiss Customs appeal No. 80–1, and the responses thereto.
>
> It appears from these papers that the judgment of the U.S. Customs Court dated June 22, 1979 (C.D. 4808), which Porter unsuccessfully sought to amend, and from which Customs appeal No. 79–30 has been taken, adjudicates the classification of only a portion of the merchandise which is the subject of the protest and complaint filed by Porter. The protest and complaint are directed to seats, or parts thereof, for rapid transit cars destined for use in the Bay Area Rapid Transit (BART) system. The judgment of June 22, 1979, appears to only cover transverse rapid transit seats. The subject entries apparently include transverse, longitudinal, and window seats. This court does not recognize any substantive distinctions with regard to classification of a transverse seat versus a longitudinal or window seat as urged by the Government in its attempt to characterize the motion to amend an apparent error in the lower court judgment as a motion for rehearing.
>
> Accordingly, these appeals are remanded to the U.S. Customs Court to reconsider Porter's motion to amend judgment of June 22, 1979, which was dismissed on September 13, 1979, and for any further proceedings which may be deemed necessary consistent with this order.

This court, then, is "to reconsider Porter's motion to amend judgment of June 22, 1979."

Porter's motion was made pursuant to Customs Court rule 12.2 which provides:

> RULE 12.2 AMENDMENT OF JUDGMENTS
>
> (a) *Clerical mistakes.*—Clerical mistakes in judgments, orders, or other parts of the record, and errors therein arising from oversight or omission, may be corrected by the court at any time on its own initiative or on the motion of any party.
>
> (b) *Mistakes, inadvertence, excusable neglect.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect.
>
> (c) *Harmless error.*—No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. At every stage of the proceeding, the court

> shall disregard any error or defect which does not affect the substantial rights of the parties.

Plaintiff did not delineate before this court which of the three subsections purportedly encompassed his motion. However, the "harmless error" subsection has not been argued and is inapplicable. Before the CCPA, plaintiff pressed 12.2(*a*) but urged 12.2(*b*) alternatively in a footnote.

No prior decision of this court has interpreted either rule 12.2 (a) or (b). However, the first sentences of Federal Rules of Civil Procedure 60 (a) and (b), from which rules 12 (a) and (b) were derived, are practically identical to this court's rules and have been examined by the Federal courts.

The relevant language from Federal rule 60(a) is: "Clerical mistakes in judgments * * * and errors therein arising from oversight or omission may be corrected * * *." Cases interpreting this rule demonstrate conclusively that there was no clerical error in this case.

At one time, rule 60(a) was confined to errors by the clerk. So, in *West Virginia Oil & Gas Co., Inc.* v. *George E. Breece Lumber Co., Inc., et al.*, 213 F. 2d 702, 705 (5th Cir. 1954), the Court wrote: "A clerical error is generally defined as an error made by a clerk in transcribing or otherwise." In 1967, Judge Bartels of the Eastern District of New York explained that "(t)he term 'clerical mistake' does not mean that it must be made by a clerk." *In re Merry Queen Transfer Corp.*, 266 F. Supp. 605, 607 (E.D.N.Y. 1967). That opinion continues:

> * * * The phrase merely describes the type of error identified with mistakes in transcription, alteration, or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others. It is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney. * * * (Id.)

According to a recent district court decision in Texas: "(i)t is well settled that clerical error specifically refers to error of transcription, copying, or calculation." *International Corporate Enterprises, Inc.* v. *Toshoku Ltd.*, 71 F.R.D. 215, 218, (N.D. Tex. 1976).

The crux of plaintiff's motion to amend judgment before this court is set out above. In sum, plaintiff's motion stated that:

> * * * *counsel belatedly recognizes an oversight in the merchandise described in its summary judgment motion. * * * plaintiff's motion inadvertently addressed only the transverse seats.* (Plaintiff's motion to amend judgment, p. 2.) [Italic supplied]

Obviously the difficulty was neither a clerical error nor one of this court.

Yet before the Court of Customs and Patent Appeals, the entire

basis for plaintiff's motion somehow was transformed. Now, Porter argued in his brief:

> *To correct the court's technical misdescription of the seats* [italic supplied], on August 7, 1979 Porter moved under Customs Court rule 12.2 to amend the court's opinion to substitute the proper product description—"transverse, window and longitudinal seats"—for "transverse" seats. [Brief in opposition to motion to dismiss appeal No. 80–1, in support of motion to dismiss appeal No. 79–30, and for reversal in appeal No. 80–1 (hereinafter plaintiff's first CCPA brief), pp. 5–6.]

Later in the same brief, plaintiff states:

> We believe that the facts make it abundantly clear that Porter's motion to amend was not a motion for rehearing but that it properly sought, under Customs Court rule 12.2(a), *only to rectify a technical error arising from mere oversight or omission—to wit, an editorial misdescription in the court's opinion.* * * * (Plaintiff's first CCPA brief, p. 9.) [Italic supplied.]

Then plaintiff writes:

> Unfortunately, the Customs Court relied on one of Porter's references to "transverse seats" in writing its opinion. Porter's motion to amend the judgment merely sought to correct this editorial error. * * * (Id., 11.)

Later, plaintiff insists the motion "was directed to a mere editorial matter."

At another point, plaintiff writes:

> * * * the motion merely seeks an editorial change in the court's opinion to clarify the description of the merchandise which the entries contain. (Id., 14.)

(Note that by plaintiff's own admission the consumption entry papers contained no distinctions as to the seats. Id., 5.) What the Customs Court must do is "make an appropriate technical correction to its opinion." Id., 17. After all this, the matter has become a simple one for plaintiff: "All that is required is a correction of the record to make it 'speak the truth'." Id., 14.

Somewhere between New York and Washington, the truth changed from "counsel belatedly recognizes (his personal) oversight" (in its motion) to "a technical error * * * in the court's opinion." Sometime between the motion to amend judgment here, on August 7, 1979, and plaintiff's first CCPA brief, filed December 17, 1979, what was "plaintiff's motion inadvertently addressed only (to) the transverse seats" became an "editorial error" by this court.

Speaking the truth, there was no clerical technical misdescription mistake by this court.

Since there was no mistake by this court, plaintiff's motion only is tenable under rule 12.2(b). The critical language there is that "the

court *may* relieve a party or his legal representative" from a mistake. (Italic supplied.) Relief is discretionary.

Pursuant to the Court of Customs and Patent Appeals' order, and exercising that discretion, the following order was issued by this court on March 10, 1980:

> In furtherance of the February 25, 1980 per curiam order of the U.S. Court of Customs and Patent Appeals in this case, each party hereby is instructed to prepare a memorandum, with affidavits, concerning the following question: Are the characteristics of the longitudinal and window seats apparently involved in the subject entries different from, for the purposes of classification under the Tariff Schedules of the United States, the transverse seats considered in *David E. Porter* v. *United States*, 82 Cust. Ct. 259, C.D. 4808, 475 F. Supp. 688 (1979)?
>
> The memoranda and affidavits shall be filed with the clerk of this court on or before April 2, 1980.

The critical memorandum was filed by the defendant who wrote:

> We have been advised by the U.S. Customs Service that the longitudinal and window seats are similar in design to the transverse seats. There are only minor design differences relating to the location of the seats within the BART rail vehicle.
>
> Accordingly, for substantive classification purposes, there are no differences between the transverse seats which were the subject of this court's decision in C.D. 4808, and the longitudinal and window seats which are listed on plaintiff's invoices. (Defendant's memorandum, pp. 1–2, Mar. 28, 1980.)

Now, as the Government (the defendant) for the first time has conceded that there are no substantial distinctions with regard to classification of transverse seats versus longitudinal and window seats, listed on plaintiff's invoices, this court accordingly amends its June 22, 1979 judgment to include said longitudinal and window seats.

(C.D. 4858)

A. N. DERINGER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Biscuits, Cookies and Candy—Admission Refused

Court No. 73-8-02142

[Judgment for defendant.]

(Decided on remand [C.A.D. 1220], May 28, 1980)

Barnes, Richardson & Colburn (*Joseph Schwartz, Edward F. Christopher* and *Michael A. Johnson* of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General (*Mark K. Neville, Jr., Laura D. Millman* and *Saul Davis*, trial attorneys), for the defendant.

FORD, Judge: This action is before me pursuant to *United States* v. *A. N. Deringer, Inc.*, 66 CCPA 50, C.A.D. 1220, 593 F. 2d 1015 (1979), wherein the court vacated the judgment of this court in *A. N. Deringer, Inc.* v. *United States*, 80 Cust. Ct. 17, C.D. 4731, 447 F. Supp. 453 (1978) and remanded the action for consideration of appellee's claim for refund of duties. In its decision of remand the court, in a footnote, made the following statement:

> We do not reach the merits of appellee's claim since such was not considered by the Customs Court. We note that the mere fact that appellee exported the goods does not, in and of itself, entitle it to a refund of the estimated duties deposited upon entry of the goods into this country. See 19 U.S.C. 1558.

Plaintiff has proceeded in this remand by the filing of a motion for summary judgment. Defendant has filed a crossmotion for summary judgment.

The statutory provision, 19 U.S.C. 1558, referred to above, provides as follows:

> § 1558. *No remission or refund after release of merchandise*
>
> (a) No remission, abatement, refund, or drawback of estimated or liquidated duty shall be allowed because of the exportation or destruction of any merchandise after its release from the custody of the Government, except in the following cases:
>
> (1) When articles are exported with respect to which a drawback of duties is expressly provided for by law;
>
> (2) When prohibited articles have been regularly entered in good faith and are subsequently exported or destroyed pursuant to a law of the United States and under such regulations as the Secretary of the Treasury may prescribe; and
>
> (3) When articles entered under bond, under any provision of law, are destroyed within the bonded period as provided for in section 1557 of this title, or are destroyed within the bonded period by death, accidental fire, or other casualty, and proof of such destruction is furnished which shall be satisfactory to the Secretary of the Treasury, in which case any accrued duties shall be remitted or refunded and any condition in the bond that the articles shall be exported shall be deemed to have been satisfied.
>
> (b) When articles are exported or destroyed under Customs supervision after once having been released from Customs custody, as provided for in subsection (c) of section 1304 of this title, such exportation or destruction shall not exempt such articles from the payment of duties other than the marking duty provided for in such subsection (c). (June 17, 1930, ch. 497, title IV, sec. 558, 46 Stat. 744; June 25, 1938, ch. 679, sec. 24, 52 Stat. 1088.)

It is clear that the provision above permits no refund of estimated or liquidated duties on exported merchandise after release from Customs custody, unless it falls within one of the three exceptions set forth supra. Obviously, exceptions 1 and 3 are not applicable.

The issue thus presented is whether the requirements of the Food and Drug Administration place the importations in the category of prohibited merchandise. If so, the court must consider whether the merchandise was entered in good faith.

It is apparent from form FD–777, issued by the Food and Drug Administration, entitled "Notice of Detention and Hearing," that the merchandise may be in violation of the law and "(t)he merchandise should continue to be held intact pending final decision as to whether it shall be admitted or refused admission." The notice further states the party has an opportunity to appear within 7 days at which time:

> (t) he testimony which you may present may include evidence as to the manner in which the article can be brought into compliance with the act or removed from its scope by rendering it not a food, drug, device, or cosmetic as defined by the act.

The subsequent notice on form FD–772 is entitled "Notice of Refusal of Admission" and concludes with the following paragraph:

> You are hereby notified that admission of above-described merchandise is refused. This merchandise must be exported under Customs' supervision within 90 days from the date of this notice or within such additional time as the District Director of Customs specifies. Failure to do so may result in destruction of the merchandise as authorized by statute.

Based upon the stipulation of facts, paragraphs 4, 5, and 6 as previously submitted to the court, the parties agreed as follows:

> 4. Plaintiff, despite the notices of detention and hearing sent because of the nonconforming labeling, failed to communicate in any way with the Food and Drug Administration, although the notices gave plaintiff the privilege of appearing for a hearing, and failed to relabel the merchandise even though it was implicit in the law and regulations that plaintiff had the right to relabel the merchandise and again seek entry thereof.
>
> 5. The merchandise involved in this case, if relabeled to correct the deficiencies noted in paragraph 1, would not have been in violation of the Federal Food, Drug and Cosmetic Act and regulations enacted pursuant to the Fair Packaging and Labeling Act.
>
> 6. The merchandise involved in this case, if so relabeled, would not have had to have been exported, and could have been released into the commerce of the United States.

Plaintiff in its present statement of facts filed pursuant to rule 8.2(b) of the rules of this court, paragraphs 16, 17, 19, 20, and 21, has in effect agreed with the original stipulation supra.

Plaintiff contends the refusal of entry places the importation in the prohibited merchandise category and, since it had entered the merchandise in good faith, it was entitled to a refund of duty as the

merchandise was exported under Customs supervision. Plaintiff argues *Kreutz & Co.* v. *United States*, 20 CCPA 109, T.D. 45752 (1932) and *A. M. & J. Solari, Ltd.* v. *United States*, 6 Cust. Ct. 373, C.D. 499 (1941) support its position that merchandise refused admission is prohibited merchandise.

Neither *Kreutz* nor *Solari* are dispositive of the issues in the instant case. These cases did not involve the interpretation of section 1558 supra or its predecessor. *Kreutz* was tried under the Tariff Act of 1922 which contained the predecessor provision of section 1558, but said provision was not in issue since section 2 of the Food and Drug Act, in effect at that time, provided that adulterated or misbranded articles of food and drugs are prohibited from being introduced into any State, territory or the District of Columbia from a foreign country. The court found, based upon the foregoing section and section 11 of the Food and Drug Act then in effect, that the merchandise was prohibited and the importer was entitled to a refund.

In *Solari* which was tried under the Tariff Act of 1930, but prior to the 1938 amendment of section 1558 involved herein, is likewise distinguishable. The merchandise therein was whisky, which Customs found was misbranded as to the age of the liquor. The term "misbranded" was defined in the Food and Drug Act then in effect and required the merchandise be refused admission. The court, based upon the record, held the merchandise was seized and destroyed without warrant of law. This being so, the court held the importer was entitled to a refund.

The present section 1558 was amended by the Customs Administrative Act of 1938 and, for the first time, provided for exceptions to the general rule that no remission, abatement, refund, or drawback of estimated or liquidated duties shall be allowed because of exportation or destruction after release from Customs custody. The provision relied upon by plaintiff, section 1558(a)(2), provides for refund for merchandise which was released from Customs custody and exported under Customs supervision when entered in good faith. Neither *Kreutz* nor *Solari* involved this question.

In any event, the court observes that the language "Refusal of Admission" used in the notice, form FD–772, is not tantamount to prohibited. The merchandise was conditionally refused admission. Had the party corrected the matters complained of by the Food and Drug Administration, it would have been permitted entry. Merchandise, such as adulterated food or food unfit for human consumption, narcotics, or immoral articles, to name a few, are prohibited. The latter term is one which cannot be corrected.

In view of the foregoing, it is unnecessary to consider the question of good faith since the merchandise was not prohibited within the

statutory language. Accordingly, defendant's cross-motion for summary judgment is granted, plaintiff's motion is denied, and the action is dismissed.

Judgment will be entered accordingly.

(C.D. 4859)

PHILIPP OVERSEAS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Stainless Steel Angles

Court No. 78-7-01253

STATUTORY CONSTRUCTION—CONGRESSIONAL INTENT DETERMINED BY REFERENCE TO RELEVANT HEADNOTES

In construing the tariff schedules "all parts of (the) statute must be read together and all relevant headnotes are to be considered in determining congressional intent." *Lyons Export & Import, Inc.* v. *United States*, 59 CCPA 142, 146, C.A.D. 1056, 461 F. 2d 830 (1972).

SAME—HEADNOTE 1, PART 2 OF SCHEDULE 6, TSUS

The language in headnote 1, part 2 of schedule 6, TSUS, "[u]nless the context requires otherwise" does not preclude the application of that headnote to the products encompassed by item 609.82, TSUS, by virtue of the language in the superior heading to that item, "Not drilled, not punched, and not otherwise advanced."

"ADVANCED"—TERM DOES NOT EMBRACE STEPS IN CREATION OF ARTICLE OR INCIDENTAL TO MAKING ROLLED SHAPE MERCHANTABLE

No step in the creation of an article is at the same time an advancement of the article. *United States* v. *Baron Tube Co. et al.*, 47 CCPA 69, C.A.D. 730 (1960); *Commercial Shearing & Stamping Company* v. *United States* (*Guadalupe Industrial Supply Co., Inc., Party-in-Interest*), 65 Cust. Ct. 91, C.D. 4060, 317 F. Supp 750 (1970), *aff'd*, 59 CCPA 203, C.A.D. 1067, 464 F. 2d 1048 (1972). Moreover, "manipulations after rolling, incident to making the rolled shape merchantable and fit for shipment, do not constitute 'advance' within the congressional intent." *American Mannex Corp.* v. *United States*, 56 Cust. Ct. 31, 36, C.D. 2608 (1966). *Accord*, *E. Dillingham, Inc., et al.* v. *United States*, 61 Cust. Ct. 33, C.D. 3522 (1968). Since the imported angles were composed of stainless steel intended for corrosion resistant service, and commercially acceptable angles of the type imported could not be produced without annealing and pickling, those processes were steps in the creation of commercially acceptable angles, and therefore (under the rationale of the above-cited cases) were not advancements within the purview of the statute. *Karl Schroff & Associates, Inc.* v. *United States*, 67

Cust. Ct. 4, C.D. 4244 (1971); *Edward W. Daniel Company* v. *United States*, 67 Cust. Ct. 132, C.D. 4264 (1971); and *F. W. Myers & Co., Inc.* v. *United States*, 45 Cust. Ct. 124, C.D. 2210 (1960), distinguished.

EJUSDEM GENERIS

Under the doctrine of ejusdem generis "where particular words of description are followed by general terms, the latter refer only to things of a like class with those particularly described." *United States* v. *C. J. Tower & Sons*, 44 CCPA 1, C.A.D. 626 (1956).

SAME—ANNEALING AND PICKLING NOT EJUSDEM GENERIS WITH DRILLED AND PUNCHED—SUPERIOR HEADING TO ITEM 609.82, TSUS

Applying the doctrine of ejusdem generis to the language "not drilled, and not punched, and not otherwise advanced" in the superior heading to item 609.82, TSUS, requires that the words "otherwise advanced" be interpreted as encompassing only those mechanical operations (like drilling and punching) which are performed after the essential characteristics of the angles are attained. Thus, annealing and pickling, which are respectively thermal and chemical operations employed in the creation of commercially acceptable stainless steel angles, are not ejusdem generis with drilling and punching. *Cf. Border Brokerage Company, Inc.* v. *United States*, 60 Cust. Ct. 487, C.D. 3437 (1968).

[Judgment for plaintiff.]

(Decided May 29, 1980)

Barnes, Richardson & Colburn, Esqs. (*E. Thomas Honey* and *John J. Galvin*, Esqs., of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *John J. Mahon*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge:

INTRODUCTION

This action involves the proper tariff classification for certain stainless steel angles imported from Norway and entered at the port of New York in October and November 1977.

The merchandise was assessed with duty at the rate of 8.5 per centum ad valorem under item 609.86 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9, plus additional duties on the chromium and molybdenum content under items 607.01 and 607.02 respectively, pursuant to headnote 4, subpart B, part 2, schedule 6. Plaintiff claims that the angles are properly dutiable at the rate of 0.1 cent per pound plus 2 per centum ad valorem under item 609.82, TSUS, as modified by T.D. 68–9, plus the additional duties on the chromium and molybdenum content, which are not contested.

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STATUTE INVOLVED

The pertinent statutory provisions in TSUS schedule 6, part 2, read:

	Angles, shapes, and sections, all the foregoing, of iron or steel, hot rolled, forged, extruded, or drawn, or cold formed or cold finished, whether or not drilled, punched, or otherwise advanced; sheet piling of iron or steel:	
	Angles, shapes, and sections:	
	Hot rolled; or, cold formed and weighing over 0.29 pound per linear foot:	
	Not drilled, not punched, and not otherwise advanced:	
	* * * * * * *	
[Claimed] 609.82	Alloy iron or steel----	0.1 cent per lb.+2% ad val.+additional duties (see headnote 4)
	Drilled, punched, or otherwise advanced:	
	* * * * * * *	
[Classified] 609.86	Alloy iron or steel----	8.5% ad val.+additional duties (see headnote 4)

THE FACTS [1]

The imported articles are stainless steel angles [2] of various sizes. These angles are produced by heating a steel billet, and then transferring it from the furnace to a hot rolling mill where it is rolled into the shape of an angle. After coming off the rolling mill, the rolled stainless shape is cooled and cut to length, after which it is annealed by reheating to a temperature of at least 1,000° C and cooled by quenching in water. To be commercially acceptable, the angles must then be straightened, since they are wavy after the rolling process (R. 17, 51, 84). After straightening, the angles are then pickled by

[1] The record consists of the oral testimony of two witnesses for plaintiff and one witness for defendant. Plaintiff's witnesses were: Edwin J. Helfand, vice president of Philipp Overseas, Inc., and James A. Kearney, a metallurgical engineer employed as a consultant to the Pittsburgh Testing Laboratory. Defendant's witness was Raymond Thomas, a metallurgist employed by United States Steel Corp. Additionally, plaintiff introduced in evidence a sample and 3 documentary exhibits; defendant submitted one documentary exhibit.

[2] This fact is admitted by defendant in its answer to para. 4 of the complaint.

dipping them into an acid solution to remove the crust or scale that formed because of the annealing process and to make the metal resistant to corrosion (R. 14–17, 31, 33–34, 50–51, plaintiff's exhibit 3).

It further appears that prior to annealing, the stainless steel shape (referred to as "hot rolled as rolled" (R. 16, 30)) has scale or rust, with no predictable hardness, tensile strength, yield point, elongation, ductility, or response to corroding action (R. 16, 50). Additionally, prior to annealing, the chromium has not properly bonded to the iron to produce a noncorrosive surface, and the annealing process is required to redistribute the chromium and the carbon to produce a proper union of the chromium with the iron in the metal (R. 14, 49–50). In short, the purpose of the annealing process is to create a uniform and predictable range of physical characteristics in the metal as well as create a corrosion resistant product (R. 14, 35, 50–51, 77);[3] the purpose of the pickling process is to remove the annealing scale so as to give the stainless steel a uniform layer of chromium oxide on its skin and make it corrosion resistant (R. 52, 80, 82).

The record also establishes that the annealing and pickling processes are an integral and vital part of the manufacture of the imported stainless steel angles; and that prior to those processes, the product, of the rolling mill are semifinished, lacking in predictable properties and not commercially acceptable as stainless steel angles (R. 16, 17, 21, 37, 52, 53–54, 78–79, 81).[4]

Finally, the record shows that while drilling and punching are mechanical operations, annealing is a thermal process, and pickling is a chemical process (R. 57). Other forms of mechanical operations performed on angles are bending and forming (R. 18), and mitering corners for knitting angles together with plates to make welded assemblies (R. 57).

OPINION

1

In construing the Tariff Schedules "all parts of (the) statute must be read together and all relevant headnotes are to be considered in determining Congressional intent". *Lyons Export & Import, Inc.* v. *United States*, 59 CCPA 142, 146, C.A.D. 1056, 461 F. 2d 830 (1972). Here, the centerpiece of the dispute is headnote 1, part 2 of schedule 6, which reads:

> * * * Unless the context requires otherwise , the provisions of this part apply to the products described by whatever process

[3] As put by defendant's witness Thomas, "the intent of the heat treatment (annealing) is to either alter the microstructure or the distribution of the micro-constituent material" (R. 95).

[4] Although ASTM (American Society for Testing Materials) specifications do not specifically mention pickling, plaintiff's witness Kearney testified that "industry practice uniformly provides for a pickled finish as a product finished in the annealed condition" and that "pickling is the normal hot rolled, annealed product finish" (R. 52–53, 81).

made (i.e., whether rolled, forged, drawn, extruded, cast or sintered) and whether or not such products have been subjected to treatments to improve the properties or appearance of the metals or to protect them against rusting, corrosion or other deterioration. These treatments include *annealing*, tempering, case-hardening and similar heat treatments or nitriding; descaling, *pickling*, scraping, scalping and other processes to remove oxidation scale and crust; * * *. [Italic added.]

It is evident from the foregoing headnote, that the products classifiable under item 609.82, TSUS, may be subjected to annealing and pickling " (u)nless the context (of item 609.82) requires otherwise."

Defendant maintains that the words in the superior heading to item 609.82, "not otherwise advanced" fall within the exclusionary language in headnote 1, part 2, schedule 6, "(u)nless the context requires otherwise"; that the imports were "otherwise advanced" by reason of having been subjected to annealing and pickling; that therefore the merchandise is excluded from item 609.82 and is properly dutiable under item 609.86.

Plaintiff, on the other hand, urges that notwithstanding annealing and pickling, the merchandise was not otherwise advanced within the purview of the superior heading to item 609.82, TSUS; and hence headnote 1, supra, is applicable to the merchandise classifiable under item 609.82.

There is no dispute that the imports were neither drilled nor punched, and defendant does not claim that the straightening operation constituted an advancement of the angles. Consequently, the issue is narrowed to determining whether the annealing and pickling operations (which are expressly allowed by headnote 1, supra, "unless the context requires otherwise") exclude the merchandise from classification under item 609.82 by reason of the language "not otherwise advanced" in the superior heading.

2

Plaintiff argues that the annealing and pickling processes were essential, integral and continuous operations in the production of the stainless steel angles, and that without such processes commercially acceptable stainless steel angles could not have been produced. Accordingly, plaintiff insists that annealing and pickling did not constitute advancements within the purview of the statute.

It is well settled that no step in the creation of an article is at the same time an advancement of the article. *United States* v. *Baron Tube Co. et al.*, 47 CCPA 69, 71, C.A.D. 730 (1960); *Commercial Shearing & Stamping Company* v. *United States*, (*Guadalupe Industrial Supply Company, Inc., Party-in-Interest*), 65 Cust. Ct. 91, 105, C.D. 4060, 317 F. Supp. 750 (1970), *aff'd*, 59 CCPA 203, C.A.D. 1067, 464 F. 2d

1048 (1972). Moreover, "manipulations after rolling, incident to making the rolled shape merchantable and fit for shipment, do not constitute 'advance' within the congressional intent." *American Mannex Corp.* v. *United States*, 56 Cust. Ct. 31, 36, C.D. 2608 (1966). *Accord, E. Dillingham, Inc., et al.* v. *United States*, 61 Cust. Ct. 33, C.D. 3522 (1968).

Since the imported angles were composed of stainless steel intended for corrosion resistant service, commercially acceptable angles of the type imported could not be produced without annealing and pickling. Plainly, then, the "hot rolled as rolled" angles, which lacked predictable physical qualities and corrosion resistance, were merely semifinished products.[5] Hence, applying the rationale of the above-cited cases, annealing and pickling were steps in the creation of commercially acceptable angles, and thus should not be considered as advancements within the purview of the statute.

Defendant argues that annealing and pickling should be considered as advancements, since those treatments were unnecessary to produce angles of alloy iron or steel. However, defendant ignores the fact that the specific type of alloy steel of which the imports were composed (stainless types 304 and 316) required the annealing and pickling operations to be commercially acceptable. Moreover, the fact that the imports were in the shape of angles after leaving the hot rolling mill does not override the more important consideration that the imports would not have been commercially acceptable angles without the annealing and pickling operations. This aspect of the case is especially pointed up by the admission of defendant's witness Thomas that he had never encountered a single order for nonannealed and nonpickled stainless steel angles, such as the imports (R. 116–117).

As underpinning for its contention that the imports were otherwise advanced by reason of the annealing and pickling processes, defendant cites: *Karl Schroff & Associates, Inc.* v. *United States*, 67 Cust. Ct. 4, C.D. 4244 (1971); *Edward W. Daniel Company* v. *United States*, 67 Cust. Ct. 132, C.D. 4264 (1971); and *F. W. Myers & Co., Inc.* v. *United States*, 45 Cust. Ct. 124, C.D. 2210 (1960).

In *Schroff* and *Daniel*, the TSUS provision under construction covered "Forgings of iron or steel, not machined, not tooled, and not otherwise processed after forging," which provision appears in the superior heading to item 608.25. In both cases, the court addressed the issue as to whether certain forgings were otherwise processed after

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[5] As pointed up in defendant's exhibit A, a steel products manual published by the American Iron and Steel Institute, p. 29: "*Heat Treatment. Stainless and heat resisting steels are seldom placed in service in the hot rolled or forged condition.* Annealing or other forms of heat treatment are desirable to obtain the full advantage of the corrosion resisting and mechanical properties of these steels. However, for *certain applications*, particularly those involving *high temperature service*, it may be desirable to use some types in the as-rolled or forged condition." [Italic added.]

forging by reason of a heat treatment known as normalizing to which the merchandise was subjected after forging. Since normalizing was not found to be incidental to creating the forgings, but rather was a subsequent process, the merchandise was held to have been otherwise processed after forging, and therefore excluded from item 608.25, TSUS.

Inasmuch as the statutory language under construction in *Schroff* and *Daniel* is different from that under consideration in the present case, defendant's reliance upon those cases is misplaced.

The statutory language under construction in *Schroff* and *Daniel* was "otherwise processed after forging". Since the term "forging" connotes a specific manufacturing process and also describes a class of articles, the court was required to determine whether normalizing was incidental to the forging process, or as found by the court, subsequent thereto. If the language here under construction were "not otherwise processed after rolling,"[6] than the legal issue in *Schroff* and *Daniel* would be analogous to that now presented, and the court would be required to determine whether the annealing and pickling operations were incidental to the rolling process or subsequent thereto. However, the issue here is not whether annealing and pickling were incidental to the rolling process,[7] but rather whether the angles were otherwise advanced. For the reasons previously expressed, I have concluded that the imports were not otherwise advanced by reason of the annealing and pickling operations. The short of the matter is *Schroff* and *Daniel* are not pertinent to the issue in the present case because of the different statutory language involved.

The *Myers* case cited by defendant is similarly inapposite. There, the issue was the proper tariff classification for certain steel castings which were annealed after casting. The court agreed with the Government's contention that the annealing process, which occurred subsequent to casting, advanced the merchandise beyond the status of mere castings (45 Cust. Ct. at 129), citing *inter alia Mountain Copper Co.* v. *United States*, 40 Treas. Dec. 103, T.D. 38823 (1921). In *Mountain Copper*, the Board of General Appraisers (predecessor of the Customs Court) in determining the classification of certain castings that had been annealed by a separate process, observed inter alia that

[6] Where Congress intended that classification be based upon whether the merchandise had been processed or advanced after a certain manufacturing operation, Congress explicitly so provided. Thus, in *Schroff* and *Daniel*, the issue was whether the articles were processed after forging. Additionally, it may be noted that Congress provided for the classification of malleable cast-iron fittings under items 610.70 through 610.74, TSUS, based upon whether such fittings have been "advanced in condition by operations or processes subsequent to the casting process." It may be added that where Congress intended to exclude certain merchandise from classification under a specific item number in part 2 of schedule 6 because it has been subjected to one of the treatments enumerated in headnote 1, explicit language to that effect is expressed within the special tariff provision. For example, items 608.70 through 608.78, TSUS, distinguish between tempered and nontempered wire rods; items 608.84 through 608.88 distinguish between pickled and nonpickled plates and sheets of iron or steel.

[7] There is no dispute that the annealing and pickling operations were not incidental to the rolling process.

"annealing ordinarily forms no part of the usual casting process, and articles so subsequently treated have thereby been further advanced in manufacture beyond the point where they may be considered mere castings."

Myers is distinguishable from the present case for the same reason that *Schroff* and *Daniel* are inapposite. The term "castings" (like "forgings") connotes a specific manufacturing process and also describes a certain class of articles. Consequently, in *Myers* the court was required to determine whether annealing was part of the usual casting process or a subsequent treatment. As previously observed, the issue here is not whether annealing and pickling were incidental to the rolling operation or a subsequent treatment. Although concededly annealing and pickling were not incidental to the rolling operation, nevertheless those processes were essential to and an integral part of the creation of the imported stainless steel angles (R. 53, 79, 80). In sum, the issue in *Myers* is not analogous to that presented here.

3

Although the facts in this case clearly show that the imports were not otherwise advanced by reason of the annealing and pickling operations, I agree with plaintiff's contention that the same conclusion may be reached by applying the doctrine of ejusdem generis. Briefly stated, under the doctrine of ejusdem generis "where particular words of description are followed by general terms, the latter refer only to things of a like class with those particularly described." *United States* v. *C. J. Tower & Sons*, 44 CCPA 1, 5, C.A.D. 626 (1956). Here, the words "otherwise advanced" in the statute are preceded by the words "drilled" and "punched".

The record shows that drilling and punching (holemaking operations) are mechanical processes by which finished angles are fabricated for assembly with other components. Hence, applying ejusdem generis to the statutory provision involved herein requires that the words "otherwise advanced" be interpreted as encompassing only mechanical operations performed after the essential characteristics of the angles are attained. However, annealing and pickling are respectively thermal and chemical operations, which in the instant case were employed in the creation of commercially acceptable stainless steel angles. Therefore, it is apparent that annealing and pickling are not ejusdem generis with drilling and punching.

As strikingly analogous to the present case, plaintiff has called attention to *Border Brokerage Company, Inc.* v. *United States*, 60 Cust. Ct. 487, C.D. 3437 (1968) wherein the court construed the superior heading to item 141.80, TSUS, which provides for "Vegetables * * * packed in salt, in brine, pickled, *or otherwise prepared or preserved*

* * *" [italic added]. One of the issues was whether the subject vegetables were otherwise prepared or preserved within the ambit of the statute by reason of freezing or blanching. Concerning that issue, the court applied ejusdem generis, citing *C. J. Tower, supra*, and held that freezing and blanching are not ejusdem generis with the enumerated processes of packing in salt, or in brine, or pickling.

CONCLUSION

The record and relevant legal principles discussed herein lead inexorably to the conclusion that the imported angles were not otherwise advanced by the annealing and pickling processes. Consequently, the presumption of correctness attaching to the Government's classification of the merchandise under item 609.86, TSUS, has been overcome, and the proper classification for the merchandise is under item 609.82, TSUS, as claimed by plaintiff.

Judgment will be entered accordingly.

(C.D. 4860)

LEE ENTERPRISES, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 77-2-00176

Unfinished Printing Plates

"MATERIAL" VS. "UNFINISHED" ARTICLE—DEDICATION TO USE TEST

"The general rule is that a thing may be classed as an unfinished article if in its imported condition it has been so far advanced beyond the stage of materials as to be dedicated to and commercially fit for use as that article and is incapable of being made into more than one article or class of articles." *Avins Industrial Products Co.* v. *United States*, 72 Cust. Ct. 43, C.D. 4503, 376 F. Supp. 879, *reh. denied*, 72 Cust. Ct. 147, C.D. 4522 (1974), *aff'd*, 62 CCPA 83, C.A.D. 1150, 515 F.2d 782 (1975).

SAME—IDENTITY OF INDIVIDUAL ARTICLE FIXED WITH CERTAINTY

Imported merchandise will be regarded as a "material" rather than as an "unfinished" article where the identity of the individual article is not fixed with certainty. *Bendix Mouldings, Inc.* v. *United States*, 73 Cust. Ct. 204, C.D. 4576, 388 F. Supp. 1193 (1974); *Sandvik Steel, Inc.* v. *United States*, 66 Cust. Ct. 12, C.D. 4161, 321 F. Supp. 1031 (1971).

SAME—PRINTING PLATES—"UNFINISHED"

The record in this case establishes that the "NAPP" photopolymer plates were dedicated to use as printing plates and that the identity of the individual articles was "fixed with certainty." After trimming, punching, and bending, the imported plates were

usable for no more than a single letter press printing plate and were not bulk material from which an unknown number of printing plates were made. "(T)he involved articles have been so far advanced that each has attained an individuality which identifies it in its unfinished state as the article it will be when finished." *Geo. S. Bush & Co., Inc.* v. *United States*, 34 CCPA 17, 20, C.A.D. 338 (1946). Hence, the NAPP plates are unfinished articles rather than materials.

UNFINISHED PARTS OF PRINTING MACHINERY

"NAPP" photopolymer plates designed and dedicated for use in rotary letter presses for printing newspapers, which after importation were required to be trimmed to size, punched and crimped for mounting them on saddles, were not precluded from the status of unfinished parts of printing machinery by virtue of the fact that the plates were trimmed to various sizes depending upon the size of the newspaper to be printed. Therefore, the merchandise is properly dutiable as parts of printing machinery under item 668.50, TSUS, as claimed by plaintiff, rather than as articles of aluminum under item 657.40, TSUS, as classified by Customs.

[Judgment for plaintiff.]

(Decided June 23, 1980)

Glad, Tuttle & White, Esqs. (*Robert Glenn White*, Esq., of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, *Susan Handler-Menahem*, trial attorney, for the defendant.

NEWMAN, JUDGE:

INTRODUCTION

Plaintiff contests the classification by Customs at Los Angeles of certain NAPP photopolymer plates imported from Japan during the period of 1972–74. The merchandise was classified by the District Director under the provisions in item 657.40, TSUS, as modified by T.D. 68–9, for articles of aluminum, not coated or plated with precious metal, and assessed duty at the rate of 9.5 per centum ad valorem. Plaintiff claims that the imports are unfinished printing plates, and are properly dutiable under the provision in item 668.50, TSUS, for "Other parts of printing machinery" at the rate of 6 per centum ad valorem, the rate applicable to printing presses under item 668.20, TSUS, as modified by T.D. 68–9.

I have concluded that plaintiff's claim should be sustained.

STATUTES INVOLVED

Tariff Schedules of the United States, 19 U.S.C. § 1202:

Classified under:

Schedule 6, part 3, subpart G:		
657.40	Articles of aluminum, not coated or plated with precious metal----------	9.5% ad val.

Claimed under:

Schedule 6, part 4, subpart D:

Printing machinery:

*	* * * * * *	*
668.20	Other, including printing presses, offset duplicating machines, and stencil copy machines	6% ad val.
*	* * * * * *	*
668.38	Steel plates, stereotype plates, electrotype plates, half-tone plates, * * * and plates of other materials, engraved or otherwise prepared for printing	* * *
668.50	Other parts of printing machinery	The rate for the articles of which they are parts.

General headnotes and rules of interpretation:

10. *General interpretative rules.*—For the purposes of these schedules—

* * * * * * *

(h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

(i)–(j) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

THE RECORD

Plaintiff presented the testimony of three witnesses: Gary L. Benshoof, director of product programs for NAPP Systems (U.S.A.), Inc. (an affiliate of Lee Enterprises, Inc.), and a former employee of plaintiff; Tom Williams, publisher of the Montana Standard, a Lee Enterprises newspaper; and James Michael Zehner, commodity team leader, U.S. Customs Service. Defendant called no witnesses. Both parties submitted various exhibits, and the official papers were received in evidence, without marking.

The pertinent facts are:

The merchandise comprises rectangular aluminum plates measuring 16 by 24 inches coated with a polyvinyl alcohol resin (photopolymer coating) which is sensitive to ultraviolet light (R. 14–15, 20). The NAPP plates are used for printing newspapers on rotary letter presses by various publishers in the United States, and have no use other than for printing (R. 18, 20–21, 72, 76). Letter press printing is a process in which an image is raised in relief and printing is performed from the raised top surface (R. 8).

In their imported condition, the photopolymer plates are not usable

for printing, but require preparation. The plates are prepared for use in printing by first exposing a newspaper page negative onto their light-sensitive surface with an ultraviolet light. This exposure to light causes chemical changes (polymerization) that harden the photopolymer coating in those areas where the light is transmitted through the negative. After the exposure process, water is sprayed onto the plates washing away the photopolymer coating in the areas that were not exposed to the ultraviolet light, leaving a relief image on the plates (R. 21, 23–24, 26).

After the relief image has been placed on the plates, they must be prepared for mounting on the letterpresses. In short, such preparation involves trimming to size, punching holes, and bending the ends of the plates (R. 28, 48).

The purpose of trimming the plates is to reduce their size to the size of the page of printed image used by the particular newspaper. Newspapers are not printed in any standard or uniform sizes, and consequently the precise amount of trimming required for a particular plate depends upon the specific size of the newspaper to be printed with that plate (R. 61, 69–70). There are no lines of demarcation on the plates for trimming (R. 47).

After trimming, holes are punched in the ends of the plates, which holes serve the purpose of holding the plates to the saddle of the press cylinder by pins (R. 32, 40, 58). The saddle is a semicyclindrial device attached to the cylinder of the rotary letter press that acts as an adapter for photopolymer plates (R. 34–36).

After hole-punching, the ends of the plates are crimped or bent to a 90-degree angle (R. 28, 47).

It takes from 7 to 10 minutes to expose the imported plates and prepare them for mounting to the saddle of the press (R. 41, 75–76).

THE ISSUE

The sole question presented is whether the trimming, hole-punching and crimping operations to which the imported plates were subjected in order to mount them on a letterpress constituted the processing of an unfinished printing plate into a finished plate, as contended by plaintiff; or whether such processing constituted the substantial manufacture of a raw material into a finished article, as maintained by defendant.[1]

OPINION

Interpretative rule 10(h) of the Tariff Schedules of the United States provides in pertinent part that "unless the context requires

[1] Defendant does not urge that the exposure and washing process used to place a relief image on the photopolymer plates constituted the imports materials rather than unfinished plates. Further, defendant does not dispute that if the imports are unfinished printing plates, they are classifiable as parts of printing machinery under item 668.50, TSUS.

otherwise, a tariff description for an article covers such article, * * * whether finished or not finished". Hence, by virtue of rule 10(h), the provision for parts of printing machinery in item 668.50, TSUS, covers unfinished parts of such machinery. While plaintiff claims that the imports are unfinished printing plates (and thus, unfinished parts of printing machinery), defendant insists that the merchandise is in material form (brief, at 6).

In *Avins Industrial Products Co.* v. *United States*, 72 Cust. Ct. 43, C.D. 4503, 376 F. Supp. 879, *reh. denied*, 72 Cust. Ct. 147, C.D. 4522 (1974), *aff'd*, 62 CCPA 83, C.A.D. 1150, 515 F.2d 782 (1975), Judge Rao articulated the dedication to use test that is applicable in determining whether particular merchandise is a material or an unfinished article or part (72 Cust. Ct. at 49):

> The general rule is that a thing may be classed an as unfinished article if in its imported condition it has been so far advanced beyond the stage of materials as to be dedicated to and commerically fit for use as that article and is incapable of being made into more than one article or class of articles. *United States* v. *Schenkers, Inc., supra*; *American Import Co.* v. *United States*, 26 CCPA 72, 74, T.D. 49612 (1938); *F. W. Myers & Co., Inc.* v. *United States*, 57 CCPA 87, 90, C.A.D. 982, 425 F. 2d 781 (1970); *Finn Bros. Inc.* v. *United States*, 59 CCPA 72, 75–76, C.A.D. 1042, 454 F. 2d 1404 (1972).

And continuing, the Court observed (72 Cust. Ct. at 50):

> Whether particular merchandise is a material or an unfinished article or part is a question which has been before the courts on many occasions, with differing results depending upon the facts and the statutory language in each case. *United States (American Sponge & Chamois Co., Inc., Party in Interest)* v. *Nylonge Corporation*, 48 CCPA 55, 61, C.A.D. 764 (1960). "The exact point in the processing of raw material at which it becomes a partly finished article or manufacture is a matter which must be determined on the basis of the circumstances of the particular case involved." *J. B. Henriques, Inc.* v. *United States*, 46 CCPA 54, 56, C.A.D. 695 (1958).

It is also well settled that imported merchandise will be regarded as a material rather than as an unfinished article or part where the identity of the individual article is not fixed with certainty. See *Bendix Mouldings, Inc.* v. *United States*, 73 Cust. Ct. 204, C.D. 4576, 388 F. Supp. 1193 (1974), *Sandvik Steel, Inc.* v. *United States*, 66 Cust. Ct. 12, C.D. 4161, 321 F. Supp. 1031 (1971), and the cases cited and discussed therein. As stated by Judge Watson in *Bendix Mouldings* (73 Cust. Ct. at 205):

> The general problem of when a material becomes an article is one which has long been the subject of judicial consideration. I believe certain useful guidelines emerge from a study of past case law. With respect to importations which are in a form dedi-

> cated to a certain use but from which the claimed individual articles have not yet fully emerged, to my mind the underlying question is whether the identity of an actual individual article can somehow be discerned.

Here, the record abundantly establishes that the NAPP plates in issue were dedicated to use as printing plates, and that the identity of the individual article was fixed with certainty. Thus, each individual imported NAPP plate was dedicated to use for no more than a single letter press printing plate and was not bulk material from which an unknown number of printing plates were made. This significant fact distinguishes the merchandise in the present case from that in the following line of cases holding the merchandise therein to be a material rather than unfinished articles or parts. *The Harding Co. et al.* v. *United States*, 23 CCPA 250, T.D. 48109 (1936) (brake linings in rolls); *American Import Co.* v. *United States*, 26 CCPA 72, T.D. 49612 (1938) (silk fishing-leader gut in coils); *F. H. Paul & Stein Bros., Inc.* v. *United States*, 44 Cust. Ct. 130, C.D. 2166 (1960) (reels of aluminum foil); *Sandvik Steel, Inc., supra* (shoe die knife steel in coils and Dieflex cutting rules in lengths); *Naftone, Inc.* v. *United States*, 67 Cust. Ct. 341, C.D. 4294 (1971) (rolls of plastic film); *Bendix Mouldings, Inc., supra* (wood moldings in 9-foot lengths dedicated for use in the manufacture of picture or mirror frames).

As may be noted, the merchandise in the above-cited cases was imported in rolls, coils, reels, or lengths rather than individual pieces which required trimming, as here. Notwithstanding the trimming required, the imported articles were still identifiable as individual printing plates in an unfinished condition. They were never cut in half (R. 60) or divided into several printing plates. In this respect, the present merchandise is somewhat analogous to the so-called natural silk gut or "tegusu" in *Geo. S. Bush & Co., Inc.* v. *United States*, 34 CCPA 17, C.A.D. 338 (1946).

In *Bush*, the natural silk gut was imported in individual pieces of from 5 to 7 feet in length. Before these pieces could be used as leaders for fishing lines, a waste portion thereof (clearly distinguishable from the usable portion of the articles) was required to be cut off. The articles from which the waste portions had been removed and which had been soaked in water and loops tied in each of the ends for the purpose of attaching a fishing line to one end and a hook to the other, were used without cutting to length as finished leaders. In finding that the individual pieces of natural silk gut were unfinished leaders rather than material, the Court of Customs and Patent Appeals commented (34 CCPA at 20):

> * * * We are of opinion, therefore, that each piece of the merchandise in question was dedicated to the making of a particular length of leader, which was not true in the *American Import Co.*

> case, *supra*, and that * * * the involved articles have been so far advanced that each has attained an individuality which identifies it in its unfinished state as the article it will be when finished. * * *

It is true, as pointed out by defendant, the imports were not dedicated to any particular size printing plates. Nevertheless, I cannot agree with defendant that such fact precludes the imports from the status of unfinished articles. The overriding fact remains that each NAPP plate, after processing, was dedicated to use as a single printing plate and "the involved articles have been so far advanced that each has attained an individuality which identifies it in its unfinished state as the article it will be when finished". *Bush*, *supra*, 34 CCPA at 20. The trimming, hole-punching and bending operations, which were required after importation, were not substantial manufacturing processes. As previously mentioned, it requires a mere 7 to 10 minutes to expose a page negative to the imported plates and prepare the plates for mounting on a particular letterpress by trimming, punching, and bending.

At the trial, defendant introduced in evidence (exhibit A) a copy of a letter dated June 6, 1972, written by W. A. Walsmith (plaintiff's then production manager) to the District Director of Customs at Chicago, Ill. Walsmith's letter states, inter alia, that the NAPP plates were imported in material form. However, it is important to note that Walsmith's letter was sent in response to a written questionnaire (exhibit B) by the District Director at Chicago as to whether the NAPP plates are "a stock size ready to fit a specific type printing machine" or "are * * * imported in material form so that they must be cut to fit the press". It is evident from Customs' questionnaire and the response thereto that, in stating that NAPP plates were imported in material form, Walsmith simply adopted one of the two alternatives suggested by the District Director.[2] Significantly, the District Director did not suggest or inquire into the possiblity that NAPP plates were imported as unfinished articles. While Walsmith's letter admits that the NAPP plates required trimming (a fact not disputed by plaintiff), Walsmith's characterization of the NAPP plates as a material is not conclusive as to the legal issue in this case.

Plaintiff has directed attention to a recent decision by Judge Watson in *The Kinney Co.* v. *United States*, 83 Cust. Ct. 137, C.D. 4831 (1979). There, the issue was whether certain flat metal pieces subjected to processing after importation were classifiable as parts of jewelry or as articles of copper. The dispute revolved about whether the merchandise was unfinished or a material. In determining that the imports

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[2] As to the other alternative suggested by the District Director, the NAPP plates clearly were not imported in stock sizes ready to fit a specific type printing machine.

were unfinished parts, the court did not discuss the additional processing required after importation to complete the articles, and the linchpin of the court's decision is found in the following observation (83 Cust. Ct. at 139):

> Plaintiff's argument that the importations are not sufficiently advanced to be parts is ingenuous. They are clearly much too developed in form and in detail and too close to the final product to be considered mere material. * * *

By the same token, here the NAPP plates are far too advanced toward the ultimate product to be considered as mere material, and consequently I find they are unfinished articles.

Finally, we reach the question of whether the unfinished printing plates are parts of printing machinery, as claimed by plaintiff.

The record shows that the imported plates were designed for use in rotary letterpresses. There is no dispute that letterpresses are classifiable under item 668.20, TSUS (paragraph 10, complaint and answer), and that letterpresses cannot function for the purposes for which they were designed and intended without the use of printing plates (paragraph 15, complaint and answer). Additionally, plaintiff's evidence establishes without contravention that the imports were dedicated to use as printing plates for printing machinery. According to the Summaries of Trade and Tariff Information (1969), schedule 6, volume 8, p. 277:

> The Bureau of Customs has also held that item 668.50 covers such articles as printing plates that have not been engraved or otherwise prepared for printing. * * *.

Plaintiff also cites *Crabtree Vickers, Inc.* v. *United States*, 79 Cust. Ct. 13, C.D. 4707, *reh. denied*, 79 Cust. Ct. 60, C.D. 4714 (1977), which involved the proper tariff classification of certain aluminum plates coated with a photosensitive plastic used in printing machinery. While interestingly, the plates in *Crabtree* were classified by Customs as parts of printing machinery under item 668.50, TSUS (plaintiff's claimed provision herein), the present issue was not before the court in that case.

In conclusion, I find that the NAPP plates are parts of printing machinery, and fall within the purview of item 668.50, TSUS, as claimed by plaintiff. Therefore, the merchandise is properly dutiable at the rate of 6 per centum ad valorem, as provided for in item 668.20, TSUS, as modified.

Judgment will be entered accordingly.

DECISION OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 80–1)

ALBERTA GAS CHEMICALS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 79–8–01295

On Defendant's Motion for Dismissal and Alternative Motion for Summary Judgment

[Defendant's motions denied.]

(Dated January 17, 1980)

Freeman, Meade, Wasserman & Schneider, Esqs. (*Jack Gumpert Wasserman, Herbert Peter Larsen* and *Philip Yale Simons*, Esqs., of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, and *Sheila N. Ziff*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge:

INTRODUCTION

Plaintiff, an importer of methyl alcohol from Canada, contests the exclusion of its merchandise from entry by the Regional Commissioner of Customs at the Port of New York. Presently before me are defendant's motion for dismissal on the grounds that the court lacks jurisdiction of the subject matter and the action fails to present any justiciable issue; and alternatively, defendant's motion for summary judgment with respect to the merits of the complaint.

I have concluded that defendant's motions must be denied.

THE FACTS

The facts pertinent to the instant motions are not in dispute, and may be briefly summarized:

On March 23, 1979, the Treasury Department (Treasury) determined that methyl alcohol from Canada is being, or is likely to be, sold at less than fair value (LTFV) within the meaning of section

330-630 O - 81 - 15

201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. 160(a)). That determination was published in the Federal Register on March 30, 1979 (44 F.R. 19090).

On June 29, 1979, the U.S. International Trade Commission determined, in investigation No. AA1921–202, that an industry in the United States is likely to be injured by reason of the importation of methyl alcohol from Canada which Treasury had determined is being, or is likely to be, sold at LTFV. The Commission's determination was published on July 12, 1979 (44 F.R. 40734).

On July 23, 1979, Treasury issued a "Finding of Dumping" respecting methyl alcohol from Canada (T D. 79–210), which finding was published in the Federal Register on July 27, 1979 (44 F.R. 44154).

The subject merchandise was exported from Canada on August 13, 1979. Entry papers (Customs form 7501) [1] and a check for estimated duties were presented by plaintiff to the appropriate Customs officer at the Port of New York on August 15, 1979. However, the entry was rejected by Customs for the reason that the importer refused to file an antidumping bond (Customs form 7591) in accordance with 19 U.S.C. 167 and 19 CFR 153.50.[2] Attached to the proffered entry papers is a statement that plaintiff did not file a bond "for the reason that there exists no valid and legal finding under the Antidumping Act of 1921 which is applicable to this class or kind of merchandise, and that the finding of the Secretary of the Treasury, T.D. 79–210, 44 F.R. 44154 of July 27, 1979, purportedly made pursuant to section 201 of the Act is illegal, *ultra vires*, null, and void, and that its publication was erroneous and contrary to law." Also attached to the tendered entry papers is a "Correction Slip" in which Customs advised: "Importer must obtain and present antidumping bond (Customs form 7591). See Customs Regulations 153.50 and 19 U.S.C. 167. T.D. 79–210 (the Finding of Dumping) applies."

The complaint in this action contests the exclusion of plaintiff's merchandise from entry and delivery "and the legality of all orders and findings of the U.S. International Trade Commission and of the Secretary of the Treasury entering into the Regional Commissioner's decision." In this connection, plaintiff alleges that the sole ground for the exclusion of the subject merchandise from entry was that plaintiff did not proffer an antidumping bond; and that the sole ground for the Regional Commissioner's demand for a bond was the Secretary's finding of dumping. Continuing, the complaint alleges that the Regional Commissioner erred in demanding, pursuant to section 208 of the Antidumping Act of 1921, as amended (19 U.S.C. 167), the posting of an antidumping bond (Customs form 7591), and in excluding

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[1] Consumption entry No. 79-638078-8.

[2] Plaintiff states in its brief that the subject merchandise is presently held in "General Order," awaiting the outcome of this case.

the merchandise from entry and delivery to plaintiff in the absence of such bond; that the Secretary's finding of dumping is illegal, *ultra vires*, null, and void; and that plaintiff is entitled to the entry and delivery of its merchandise without the posting of an antidumping bond because no legal and valid finding of dumping covers the merchandise. The complaint then sets forth three causes of action, each of which controverts some phase of the antidumping proceedings leading to the Secretary's finding of dumping, including the Secretary's LTFV investigation and determination, and the subsequent affirmative injury determination by the Commission. The relief sought by plaintiff in its complaint is an adjudication that the Secretary's finding of dumping is illegal, null, and void; that the Antidumping Act of 1921 is therefore inapplicable to exportations of methyl alcohol from Canada; and an order that the Regional Commissioner accept plaintiff's entry and deliver the merchandise to plaintiff without filing an antidumping bond. The complaint does not challenge the assessment of any duty nor seek a refund.

STATUTES INVOLVED

The statutory provisions involved, so far as pertinent, read:

19 U.S.C. 167:

> In the case of all imported merchandise * * * of a class or kind as to which the Secretary of the Treasury has made public a finding [of dumping] * * *, and delivery of which has not been made by the appropriate customs officer before such finding has been so made public * * *, it shall be unlawful for such customs officer to deliver the merchandise until [the importer] has * * * given bond to such customs officer * * *.

19 U.S.C. 1514:

> (a) *Finality of decisions; return of papers*
>
> Except as provided in section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by American manufacturers, producers, and wholesalers), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;
>
> (5) the liquidation or reliquidation of an entry, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; and

(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the U.S. Customs Court in accordance with section 2632 of title 28 within the time prescribed by section 2631 of that title. When a judgment or order of the U.S. Customs Court has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

* * * * * * *

28 U.S.C. 1582:

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) The appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

* * * * * * *

PARTIES' CONTENTIONS

The nub of defendant's motion to dismiss is that plaintiff has not raised any issues which may properly be considered by this court in reviewing an administrative decision (including the legality of all orders and findings entering into the same) as to the exclusion of merchandise from entry or delivery under any provision of the Customs law.[3] Specifically, defendant's position is that, until an entry has been liquidated and dumping duties assessed, no justiciable issue can be presented concerning the administrative findings and determinations made in the antidumping proceedings, and therefore this action was brought prematurely. Defendant further maintains that plaintiff's action is, in essence, one for a declaratory judgment, which this court is without jurisdiction to grant.

[3] Defendant's reply brief (p. 2) contends that "the only matters reviewable at this time would be those relating to the bond requirements, such as the validity of the foregoing provisions [19 U.S.C. 167 and 19 CFR 153.50 and 153.51(b)], a claim of procedural irregularity pertaining to the bond requirement, or an assertion that the dumping finding is inapplicable to the involved merchandise (e.g., that the subject shipment is not methyl alcohol or is not from Canada)."

The gravamen of plaintiff's complaint is that its merchandise has been wrongfully excluded from entry and delivery under the provisions of the Customs laws requiring the filing of an antidumping bond (19 U.S.C. 167; 19 CFR 153.50); that this court possesses jurisdiction under 28 U.S.C. 1582(a)(4) to review the denial of a protest against such exclusion, including the legality of all orders and findings entering into the same. On the latter aspect, plaintiff urges that an antidumping bond was demanded by Customs because of the Secretary's finding of dumping (and the underlying determinations in the antidumping proceeding), and consequently the legality of the finding presents a justiciable issue within the court's jurisdiction under 28 U.S.C. 1582(a)(4) to review "the legality of all orders and findings entering into the [exclusion]."

THE ISSUE

As may be noted, under 28 U.S.C. 1582(a)(4) this court has exclusive jurisdiction to review the denial of a protest against "the exclusion of the merchandise from entry or delivery under any provisions of the Customs laws," and "the legality of all orders and findings entering into the same." The crux of the issue in this case is whether the finding of dumping and administrative determinations in the antidumping proceedings contested in the complaint constitute "orders and findings entering into" the administrative decision excluding the merchandise from entry.

OPINION

Preliminarily, it should be observed there is no dispute that under 28 U.S.C. 1582(a) this court has jurisdiction over an action brought by an importer contesting an assessment of dumping duties and all underlying administrative determinations. Thus, "(i)n such cases (the Customs Court) may review the actions of the Secretary of the Treasury and the Tariff Commission (now U.S. International Trade Commission) to determine whether the procedures prescribed by Congress have been followed and whether the Secretary, the Tariff Commission, or their delegates have proceeded within the statutory authority or whether their actions are *ultra vires* and void." *Matsushita Electric Industrial Company, Ltd., et al.* v. *United States Treasury Department et al.*, 67 Cust. Ct. 328, 331, C.D. 4292 (1971), *aff'd*, 60 CCPA 85, C.A.D. 1086, 485 F. 2d 1402 (1973), *cert. denied*, 414 U.S. 821 (1973).

But here, there has been no assessment of dumping duties. Indeed, the subject merchandise has been excluded from entry, and plaintiff predicates this court's jurisdiction on 28 U.S.C. 1582(a)(4), pursuant to which this court may review the denial of a protest against the

exclusion of merchandise from entry or delivery under any provision of the Customs laws, including the legality of *all* orders and findings entering into the same.

As we have seen, the merchandise was excluded from entry and delivery solely because of plaintiff's refusal to file the antidumping bond required by 19 U.S.C. 167 and the Customs Regulations, cited *supra*. Plaintiff insists that it is entitled to entry and delivery of the subject merchandise without filing an antidumping bond on the ground that the finding of dumping is illegal, null, and void.

Plainly, the legality of Customs demand for a bond and the exclusion of the merchandise from entry because of plaintiff's refusal to file a bond rest upon the legality of the underlying finding of dumping. If that finding is valid, then Customs demand for a bond is unquestionably correct. If, on the other hand, the Secretary's finding is invalid, as claimed by plaintiff, then the insistence of Customs upon the filing of a bond is erroneous, and plaintiff is entitled to acceptance of its proffered entry and the delivery of the subject merchandise (assuming all other entry requirements have been satisfied).

If plaintiff had complied with Customs demand for the posting of an antidumping bond and entered its merchandise, any issue raised after entry concerning the legality of the exclusion for refusal to file a bond would be moot. Since the court is not empowered to decide moot questions, plaintiff acted appropriately and within its rights in refusing to file a bond and presenting the issue of the legality of the exclusion of its merchandise from entry pursuant to 19 U.S.C. 1514(a)(4) and 28 U.S.C. 1582(a)(4). *Cf. Southwestern Sugar & Molasses Co., Inc.* v. *United States*, 21 Cust. Ct. 8, C.D. 1117 (1948). Plaintiff's claim falls within a class of administrative decisions which are contestable prior to liquidation and payment of duties. *Schenley Distillers, Inc.* v. *United States*, 65 Cust. Ct. 651, C.D. 4152 (1970); *Central Commodities Corp.* v. *United States*, 6 Cust. Ct. 452, C.D. 514 (1941). Further, inasmuch as plaintiff's action falls squarely within the relief this court may grant under 28 U.S.C. 1582(a)(4), defendant's contention that plaintiff's action calls for a declaratory judgment is totally without merit.

The right of the plaintiff to challenge an underlying finding entering into the exclusion of its merchandise from entry is expressly authorized by that portion of 19 U.S.C. 1514(a) which provides for filing of a protest against "decisions of the appropriate customs officer, *including the legality of all orders and findings entering into the same.*" (Italic added.) It is true that the finding of dumping *per se* did not exclude the merchandise from entry. Nevertheless, the Secretary's finding is inextricably linked to and bound up with the subsequent chain of events: Customs demand for an antidumping bond (predicated upon the finding), plaintiff's refusal to file such bond, and the

ultimate exclusion of the merchandise from entry because of that refusal. Hence, I conclude that the Secretary's finding of dumping entered into the administrative decision excluding the merchandise from entry and delivery; and that the complaint presents justiciable issues respecting the legality of that finding within the jurisdiction of this court under 28 U.S.C. 1582(a) (4). Defendant's highly restrictive interpretation of the statute to the contrary is not supported by any legislative history called to my attention, and I find that prior judicial decisions relied on by defendant are readily distinguishable.

Defendant relies heavily on my prior decision in *Alberta Gas Chemicals, Inc.* v. *W. Michael Blumenthal, Secretary of the Treasury, et al.*, 82 Cust. Ct. 77, C.D. 4792, 467 F. Supp. 1245 (1979). There, the plaintiff challenged the validity of the Treasury's antidumping investigation prior to liquidation and assessment of dumping duties, and brought an action for a declaratory judgment and ancillary relief pursuant to 28 U.S.C. 2201 and 2202. Plaintiff moved for summary judgment, and defendant cross-moved for dismissal on the ground that the statutory prerequisites for invoking the court's jurisdiction under 28 U.S.C. 1582 had not been complied with. In granting defendant's motion to dismiss for lack of jurisdiction, I rejected plaintiff's argument that it was contesting an order or finding entering into a *"charge or exaction"* within the purview of subdivision (a)(3) of sections 1582 and 1514. Moreover, in the prior case, since no finding of dumping was in effect, no antidumping bond could be demanded, and there was no exclusion of merchandise from entry or delivery. However, the thrust of plaintiff's present action is to challenge an exclusion of its merchandise from entry as authorized by subdivision (a)(4) of sections 1582 and 1514, which makes the prior case irrelevant to the present issue. The other cases cited by defendant for the proposition that plaintiff's action is premature [4] are distinguishable for the same reason, viz, they did not involve an action against exclusion of merchandise from entry, and thus the court's jurisdiction under 28 U.S.C. 1582(a)(4) was not invoked, as in the instant case.

Additionally, defendant argues that *Central Commodities Corp.* v. *United States*, 6 Cust. Ct. 452, C.D. 514 (1941) is controlling on the facts in the instant case. In *Central Commodities*, plaintiff filed a protest against the collector's exclusion of merchandise from entry because of the plaintiff's failure to deposit (in addition to a bond covering

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[4] *J. C. Penney Company, Inc.* v. *United States Treasury Department* 439 F. 2d 63 (C.A. 2, 1971), *cert. denied*, 404 U.S. 869 (1971); *In re N.C. Trading, A Division of Minemet Metals, Inc.*, 66 CCPA —, C.A.D. 1215, 586 F. 2d 221 (1978); *Matsushita Electric Industrial Company, Ltd., et al.* v. *United States Treasury Department et al.*, 67 Cust. Ct. 328, C.D. 4292 (1971), *aff'd*, 60 CCPA 85, C.A.D. 1086, 485 F. 2d 1402 (1973), *cert. denied*, 414 U.S. 821 (1973); *Russell Stanfield Dexter* v. *United States*, 78 Cust. Ct. 179, C.R.D. 77-1, 424 F. Supp. 1069 (1977); *Flintkote Company, Glens Falls Division* v. *W. Michael Blumenthal, Secretary of the Treasury*, Civil Action 78-CV-640 (N.D.N.Y. 1979) (unreported memorandum decision), *aff'd*, 596 F. 2d 51 (C.A. 2, 1979).

estimated countervailing duties and a certified check for regular import duties) payment of estimated countervailing duties of 25 percent. Plaintiff sought an order directing the collector to permit entry and accept the deposit of duty which the plaintiff estimated was due. In addition to the issue concerning the correct estimated duties to be deposited upon entry, plaintiff attempted to argue the issue as to whether the merchandise was subject to countervailing duties. Respecting the latter, Judge Cline commented (6 Cust. Ct. at 455): "That argument relates to the rate or amount of duties and the law gives the importer the right to protest against the rate or amount of duties within 60 days after, but not before, liquidation."

In short, *Central Commodities Corp.* is clearly distinguishable from the present case, since here, plaintiff's challenge to the legality of the finding of dumping *as underlying the imposition of an antidumping bond* does not involve any question of rate or amount of duties.

Defendant also cites in support of its position *McKesson & Robbins (Inc.)* v. *United States*, 43 Treas. Dec. 214, T.D. 39511 (1923) and *S. J. Charia & Co.* v. *United States*, 33 Cust. Ct. 107, C.D. 1642, 135 F. Supp. 727 (1954), *aff'd*, 43 CCPA 147, C.A.D. 622, 248 F. 2d 124 (1956).

In *McKesson*, the Board of General Appraisers (predecessor of the Customs Court) held that the collector's refusal to accept tender of an entry for withdrawal and transportation in bond to the Port of New Orleans, of opium which had been imported into New York, was properly protestable under section 514 of the Tariff Act of 1922. Noting that the collector had refused to accept entry in accordance with certain regulations of the Federal Narcotics Control Board allowing crude opium to be entered for transportation in bond only between certain designated ports, which did not include New Orleans, the Board stated that *the sole issue presented was whether or not the Federal Narcotics Control Board exceeded its statutory power in promulgating the regulations cited by the collector as authority for his decision refusing the tendered entry of the importer.*

And in *Charia*, the collector excluded from entry certain cigar lighters that were sought to be imported into the United States by plaintiff. The exclusion of plaintiff's entry was predicated upon a Presidential order issued pursuant to the provisions of section 337 of the Tariff Act of 1930 relating to unfair practices in the import trade. Plaintiff contested the exclusion *by disputing that the underlying Presidential order was applicable to its merchandise and challenging the constitutionality of that order.*

Neither *McKesson* nor *Charia* supports the narrow construction of 28 U.S.C. 1582(a)(4) urged by defendant. Rather, these cases support plaintiff's claim that, under the "exclusion jurisdiction" of

this court, the legality of all underlying findings and orders (and regulations) may be determined. As I construe the relevant jurisdictional statutory provisions herein, it is entirely appropriate for plaintiff to challenge the underlying findings entering into the exclusion of its merchandise from entry for refusal to file an antidumping bond, and plaintiff was not required to make entry and await a liquidation and assessment of dumping duties. The fact that the finding of dumping (and underlying determinations) sought to be challenged by plaintiff in this action could be contested after entry, liquidation and assessment of dumping duties does not preclude plaintiff from proceeding expeditiously in this action against exclusion to protect any present rights it may have to enter its merchandise without filing an antidumping bond. This approach is consistent with those cases relied upon by defendant wherein the court held that an importer whose entry is rejected has a cause of action arising out of the refusal to accept the entry, as well as a *separate* cause of action arising out of liquidation of the entry. See *A. N. Deringer, Inc.* v. *United States*, 37 Cust. Ct. 166, C.D. 1818 (1956), and *Border Brokerage Co.* v. *United States*, 43 Cust. Ct. 226, C.D. 2131 (1959), *rev'd on other grounds*, 48 CCPA 10, C.A.D. 754 (1960).

We reach defendant's contention that if plaintiff's position herein is accepted, other importers by refusing to comply with an entry requirement will be able to obtain expeditious judicial review under 28 U.S.C. 1582(a)(4) of contested classifications, valuations, and a wide range of other administrative decisions without payment of any liquidated duties. I find no merit in that argument since under 28 U.S.C. 1582(a)(4), this court may review only the legality of orders and findings *entering into the exclusion of merchandise from entry or delivery.* Hence, only where the classification of merchandise enters into the administrative decision excluding the merchandise from entry or delivery could the classification be contested prior to liquidation. For example, in *Western Dairy Products, Inc.* v. *United States*, 72 Cust. Ct. 75, C.D. 4506, 373 F. Supp. 568 (1974), *aff'd*, 62 CCPA 37, C.A.D. 1142, 510 F. 2d 376 (1975), the issue was whether certain calcium reduced, dried, skim milk was classifiable under the TSUS as an article of milk and thus subject, as Customs determined, to certain license requirements proclaimed by the President pursuant to the Agricultural Adjustment Act, or classifiable under the TSUS as an edible preparation, not specially provided for. Customs refused to allow the withdrawal of the merchandise from warehouse for consumption because of plaintiff's failure to obtain a license from the Secretary of Agriculture. Plaintiff having failed to establish that the import was not an article of milk, as classified by Customs, the court held that the merchandise was subject to the license, and the Government's

decision refusing to release the product for consumption in the United States without a license was sustained.

Finally, we consider plaintiff's reference to section 1001(a) of the Trade Agreements Act of 1979, Public Law 96–39, 93 Stat. 300 et seq. which became effective January 1, 1980. On this aspect, plaintiff correctly points out that a new section 516A of the Tariff Act of 1930 (as enacted by sec. 1001(a) of the Trade Act) greatly expands the opportunity for judicial review in this court of the administrative determinations in countervailing and antidumping duty matters prior to the imposition of such duties.[5] While these new provisions, which expedite judicial review, are undoubtedly salubrious, I must agree with defendant's contention that they have no applicability in the instant case.

CONCLUSION

For the reasons stated herein, I have concluded that pursuant to 28 U.S.C. 1582(a)(4) this court clearly has jurisdiction to determine the legality of the exclusion of plaintiff's merchandise from entry for refusal to file an antidumping bond, and in that connection to decide the legality of the Secretary's underlying finding of dumping (T.D 79–210). Accordingly, I hold that the complaint presents justiciable issues that may be determined in this action; and therefore, defendant's motion to dismiss is denied.

Defendant's alternative motion for summary judgment is premature and therefore not properly before the court at this juncture. Rule 8.2(a) of this court provides that a motion for summary judgment may be made *"at any time after a responsive pleading has been filed."* [Italic added.] Defendant has not filed an answer or other responsive pleading to the complaint. Hence, defendant's suggestion that the court ignore the procedural requirements of its own rule 8.2(a) and instead follow rule 56(b) of the Federal Rules of Civil Procedure, which allows the party against whom a claim is asserted to move, at any time, for a summary judgment, is without merit.[6] Accordingly, defendant's alternative motion for summary judgment respecting the merits of the

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[5] Under sec. 516A(a)(2)(A), an action may be commenced by any person with standing within 30 days after the date of publication in the Federal Register of any antidumpting or countervailing order or notice of determination.

[6] Rule 8.2(b), as amended on Jan. 1, 1980, permits a party against whom a claim is asserted to move for a summary judgment at any time after the filing of a complaint. This amendment is applicable to *"further proceedings* in actions then pending, except to the extent that in the opinion of the court (its) application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies" [Italic added]. In the instant case, both defendant's alternative motion for summary judgment and plaintiff's opposition thereto were filed prior to Jan. 1, 1980, in reliance upon the provisions of old rule 8.2, and hence are *pending* proceedings rather than "further proceedings." Indeed, neither plaintiff nor defendant made any reference whatever to the proposed new rule. Moreover, plaintiff's memoranda do not address the merits of the case.

Under these circumstances, it is clear that the new rule has no application in this case, and in any event its application would "work injustice" to plaintiff.

complaint is denied. Defendant shall serve and file its answer to the complaint within 30 days after service of this order.

(C.R.D. 80–2)

SCM Corporation, plaintiff *v.* United States (Brother International Corporation, Party-in-Interest), defendant

Court No. 77–4–00553

Plaintiff, an American manufacturer of typewriters, contests a negative injury determination by International Trade Commission under the Antidumping Act of 1921 concerning typewriters imported from Japan. Plaintiff contends that the Commission erred in its interpretation of the term "injury" as it appears in the statute. 19 U.S.C. 160(a). Plaintiff and defendant move for summary judgment. The court found that the International Trade Commission in its initial determination failed adequately to articulate the bases for its negative injury determination and ordered that the proceedings be stayed for such necessary time, not to exceed 90 days, as the ITC may require to supply the court with a more specific and explicit statement of reasons supporting its conclusions.

Administrative Law—Judicial Review—Scope

In reviewing an ITC "no-injury" determination, the court, at a minimum, must determine whether the ITC determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971). Although this standard of review is a limited one, the court nonetheless is required to engage in a "searching and careful" inquiry into the facts, and the ITC's conclusions are not shielded from a "thorough, probing, in-depth review" by the court, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, to determine whether the ITC has exercised its discretion in a manner consistent with legislative intent. *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 93 S.Ct. 2367 (1973); *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 78 S.Ct. 173 (1957).

Administrative Law—Judicial Review—Record for Review

To enable the court to determine whether the ITC's discretion has been exercised in a manner which is neither arbitrary nor capricious, the ITC's determination must "delineate and make explicit the basis upon which discretionary action was taken," *Dunlop* v. *Bachowski*, 421 U.S. 560, 95 S. Ct. 1851 (1975), so that the court is not compelled to guess at the rationale underlying the ITC's determination.

Administrative Law—Judicial Review—Specificity of Administrative Determination

For purposes of judicial review, the ITC's determination must "articulate a rational connection between facts found and the choice

made," *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 83 S. Ct. 239 (1962), so that the court can determine whether the basis on which the ITC exercised its discretion is consistent with the mandate from Congress. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 78 S. Ct. 173 (1957).

ADMINISTRATIVE LAW—PRACTICE & PROCEDURE—STAY OF PROCEEDINGS

When the International Trade Commission fails adequately to articulate the bases for its conclusions in a negative injury determination under the Antidumping Act of 1921, the reviewing court may stay proceedings to provide the ITC with an opportunity to submit an explicit statement of the reasons supporting its conclusions, so that the court may properly carry out its duty of judicial review. *United States* v. *Bianchi & Co.*, 373 U.S. 709, 83 S. Ct.1409 (1963).

(Dated March 7, 1980)

Frederick L. Ikenson for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

Tanaka, Walders & Ritger (*H. William Tanaka, Lawrence R. Walders* and *Wesley K. Caine* on the briefs) for the party-in-interest.

RE, Chief Judge: In this American manufacturer's action, plaintiff, a domestic manufacturer of typewriters, seeks to review the negative injury determination of the International Trade Commission in "Portable Electric Typewriters From Japan," investigation No. AA 1921–145 under the Antidumping Act of 1921, as amended (19 U.S.C. 160, et seq. (1970)), ITC Pub. 732, 40 F.R. 27079 (1975).

In brief, under the Antidumping Act of 1921, a special dumping duty may be assessed upon imported merchandise that is being sold in the United States at less than its fair value. As stated in a prior opinion of the court in this case, an American manufacturer may file a petition with the Secretary of the Treasury to protest actual or threatened injury to an industry or the establishment of an industry. The Secretary has the duty to determine whether that class or kind of imported merchandise is being sold, or is likely to be sold in the United States or elsewhere, at less than fair value.

If the Secretary issues an affirmative finding of sales at less than fair value, the matter is referred to the International Trade Commission. The Commission must then determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the less than fair value sales. If the Commission makes an affirmative finding of injury or likelihood of an injury, the Secretary of the Treasury must publish in the Federal Register notice of his determination as well as the findings of the Commission. Under the Antidumping Act these administrative decisions comprise the "dumping findings." As a consequence of the

findings of "dumping," the imported merchandise is assessed with an additional "special dumping duty."

In this action, after receipt of the plaintiff's petition, the Secretary of the Treasury initiated an investigation which resulted in the publication of a determination that sales of portable electric typewriters from Japan were being or were likely to be sold at less than fair value. Thereupon, the International Trade Commission conducted its investigation and rendered a negative determination, i.e., that an industry in the United States is not being or likely to be injured, or prevented from being established, by reason of the less than fair value sales. In summary, the Commission reached a negative injury determination, and therefore no dumping findings were published. See *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 435 F. Supp. 1224, 1225–1226, 79 Cust. Ct. 163 (1977).

This case has a long history. See *SCM Corporation* v. *United States International Trade Commission et al.*, 404 F. Supp. 124 (D.D.C. 1975); *Same*, 549 F. 2d 812 (D.C. Cir. 1977) (reversing the dismissal by the district court, and remanding with instruction to retain jurisdiction until SCM brought action in the U.S. Customs Court to enable the Customs Court to determine whether it had jurisdiction to review a negative injury determination of the ITC in an American manufacturer's action under section 516 of the Tariff Act of 1930, as amended); *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 435 F. Supp. 1224, 79 Cust. Ct. 163 (1977) (motion for a three-judge panel denied); *Same*, 450 F. Supp. 1178, 80 Cust. Ct. 226 (1978) (upheld jurisdiction in the U.S. Customs Court); *Same*, 81 Cust. Ct. 159, C.R.D. 78–13 (1978) (motion for discovery); *Same*, 473 F. Supp. 791, 82 Cust. Ct. 351 (1979) (claim of executive privilege).

What is sought to be reviewed by the present cross-motions for summary judgment by plaintiff and defendant, respectively, is the negative injury determination made by the International Trade Commission. Specifically, plaintiff contends that the ITC erred in its interpretation of the term "injury," as it appears in the Antidumping Act of 1921 (19 U.S.C. 160(a)).

This is not the first case in this court which presents questions as to the scope and standard of judicial review of administrative determinations during dumping proceedings. This case, however, in addition to the scope and standard of review to be applied to an ITC negative injury determination, raises the question of the degree of specificity required by that determination in order that it may be properly reviewed by the court.

The scope or standard of judicial review of administrative action is often set forth in the applicable statute. No provision, however, is

made in the case of judicial review of an ITC injury determination in a dumping proceeding. Although the Trade Agreements Act of 1979 provides that the Commission's final determinations, such as the one now before this court, are subject to judicial review under a "substantial evidence" test, the present action was commenced prior to the enactment of that provision.

Nevertheless, in a series of decisions, the Court of Customs and Patent Appeals has established that the scope of review applicable to the determinations of the U.S. Tariff Commission,[1] the predecessor of the ITC, is limited to whether the Commission acted within its delegated authority, correctly interpreted the statute, and correctly applied the law. *Kleberg* v. *United States*, 21 CCPA 110, T.D. 46446 (1933); *City Lumber Co.* v. *United States*, 311 F. Supp. 340, 64 Cust. Ct. 826 (1970), *aff'd*, 457 F. 2d 991, 59 CCPA 89 (1972); *Imbert Imports* v. *United States*, 475 F. 2d 1189, 60 CCPA 123 (1973). See also recent discussion by Judge Newman in *Armstrong Bros. Tool Co. et al.* v. *United States, etc.*, 84 Cust. Ct.16, C.D. 4838 (1980), *appeal pending*. In the case at bar, the fundamental question presented is whether the ITC correctly interpreted and applied the Antidumping Act of 1921 in making its negative injury determination.

In defining the proper role of judicial review of administrative action involving the exercise of discretion, the Supreme Court has stated that:

> In all cases agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413–414, 91 S. Ct. 814 (1971).

In *Overton Park*, the question presented was whether the action of the Secretary of Transportation, pertaining to the construction of an interstate highway through a public park in Tennessee, was invalid without formal findings. The lower courts held, and the Supreme Court agreed, that, under the governing statute, the agency determination did not require formal findings; and, that the only hearing required was "nonadjudicatory, quasi-legislative" in nature. Nevertheless, the Supreme Court held that, even under the arbitrary and capricious standard of review, the reviewing court is required "to engage in substantial inquiry." The review function was explained as follows:

> Certainly, the Secretary's decision is entitled to a presumption of regularity. [Citations.] But that presumption is not to shield his action from thorough, probing, in-depth review. * * *

[1] Renamed the U.S. International Trade Commission by section 171(a) of the Trade Act of 1974 (19 U.S.C. 2231(a)) (1979).

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. * * * To make this finding [that the determination was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law] the court must consider whether the decision was based on *a consideration of the relevant factors* and whether there has been a clear error of judgment. * * * Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency. [Italic added.] 401 U.S. at 415–416.

When the administrative determination is not based upon a record, courts have limited the scope of their inquiry to the administering authority's statement of the reasons for its determination. See cases cited in *Suwannee Steamship Co.* v. *United States*, 435 F. Supp. 389, 392–393, 79 Cust. Ct. 19 (1977). Thus, in *Dunlop* v. *Bachowski*, 421 U.S. 560, 95 S. Ct. 1851 (1975), the Supreme Court required the agency (the Secretary of Labor) to provide a statement of reasons, and the essential facts upon which the decision was based, even though neither the statute nor its legislative history said anything about either findings or reasons.

The Court reasoned that since a reviewing court was not authorized to substitute its judgment for that of the agency, the agency must indicate explicitly the basis upon which the discretionary action was taken. This will enable the court to determine, with a degree of certainty, whether or not the discretionary action taken by the agency was exercised in a manner that was neither arbitrary nor capricious. See *Dunlop* v. *Bachowski*, 421 U.S. at 571–572, *citing De Vito* v. *Shultz*, 300 F. Supp. 381, 383 (D.D.C. 1969).

Accordingly, however narrow the standard of judicial review, the Commission's determination is not shielded from a "thorough, probing, in-depth review." Furthermore, the court is required to engage in a "searching and careful" inquiry into the facts.

To perform the function of meaningful judicial review, the court requires the assistance and collaboration of the administrative agency. The cooperative effort of agency and court, and the necessity for "principled decision-making," was stated as follows by Chief Judge Bazelon in *Environmental Defense Fund Inc.* v. *Ruckelshaus*, 439 F. 2d 584 (D.C. Cir. 1971):

> We stand on the threshold of a new era in the history of long and fruitful collaboration of administrative agencies and reviewing courts. * * *
> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. * * * When administrators provide

> a framework for principle decision-making, the result will be to diminish the importance of judicial review by enhansing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought. 439 F. 2d at 597–598.

Judge Leventhal, writing for the same court, has referred to the "salutary principle of judicial restraint" combined with "an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest." *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 851 (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1971). He noted that although a court may defer to administrative expertise, it must nevertheless undertake a study of the record "to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." 444 F. 2d at 850.

The following statements from the *Greater Boston Television Corp.* case are particularly applicable here:

> The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistance that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. 444 F. 2d at 851.

In the case of administrative action based upon a record, courts have engaged in close scrutiny of that record, especially with reference to technical and specialized matters, in order to review the administrative action in issue. *Ethyl Corporation* v. *Environmental Protection Agency*, 541 F. 2d 1 (D.C. Cir. 1976), *cert. den.*, 426 U.S. 941 (1976). In an extensive discussion pertaining to the proper application of the "arbitrary and capricious" standard of review, in the *Ethyl Corporation* case the Court of Appeals for the District of Columbia stated:

> This standard of review is a highly deferential one. It presumes agency action to be valid. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415, 91 S. Ct. 814, 823 [Citations.] Moreover, it forbids the Court's substituting its judgment for that of the agency, *Citizens to Preserve Overton Park* v. *Volpe*, [*supra*,] * * *, and requires affirmance if a rational basis exists for the agency's decision. [Citations.]
>
> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual.

The court continued:

> There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the

> two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. * * * The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decisionmaker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. *Market Street Railway* v. *Railroad Commission*, 324 U.S. 548, 559–561, 65 S. Ct. 770, 776–777 * * *. 541 F. 2d at 34–36.

Concurring in the *Ethyl Corp.* case, Judge Leventhal, in an analysis of the role of a court in reviewing a challenge of technical administrative determinations, wrote:

> The aim of the judges is not to exercise expertise or decide technical questions, but simply to gain sufficient background orientation. * * * When called upon to make de novo decisions, individual judges have had to acquire the learning pertinent to complex technical questions in such fields as economics, science, technology and psychology. Our role is not as demanding when we are engaged in review of agency decisions, where we exercise restraint, and affirm even if we would have decided otherwise so long as the agency's decisionmaking is not irrational or discriminatory.
>
> The substantive review of administrative action is modest, but *it cannot be carried out in a vacuum of understanding.* Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably. (Italic added.) 541 F. 2d at 69.

It is obvious that a reviewing court cannot perform its function if the administrative agency, here the ITC, has not properly discharged its responsibility which "flows naturally from the functional relationship existing between reviewing court and administrative agency." *Public Media Center* v. *FCC*, 587 F. 2d 1322 (D.C. Cir. 1978). Judge Tamm, quoting from *American Smelting & Refining Co.* v. *FPC*, 494 F. 2d 925, 945, *cert. den.*, 419 U.S. 882, emphasized that "the failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible." He added that a "reviewing court must be presented with the rationale underlying the importance of factual distinctions as well as the factual distinctions themselves." 587 F. 2d at 1331–1332.

These principles of judicial review of administrative determinations, as developed by case law, are especially pertinent to determinations made by the ITC.

In the 1958 amendments to the Antidumping Act, Congress directed the Commission, then the Tariff Commission, to publish its injury determination, "with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative." Public Law 85–630, section 1(3), 72 Stat. 583 (1958) (19 U.S.C. 160(c)).

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The congressional intent, for including the requirement of a statement of reasons in a Commission determination, is explained in the legislative history of the 1958 amendments to the Antidumping Act:

> *Provision is also made for published notice of decisions, whether affirmative or negative with reasons therefor.* The Treasury Department will be required to publish such reports on its determinations with respect to sales at less than fair value and the Tariff Commission will be required to publish such reports on its determinations with respect to injury. *In the past there has been no established practice on this point, except that U.S. Tariff Commission decisions have been published, sometimes with, sometimes without reasons.* Mandatory publication will enable all concerned to know what are the developments in connection with the Antidumping Act, and what types of cases are being found within or without the scope of its application. [Italic added.] S.R. 85–1619, U.S. Code Cong. & Ad. News, 1958, vol. 2, p. 3501.

The Trade Act of 1974, which substantially revised the antidumping law, embodies a dual statutory command for the International Trade Commission. Thus, section 201(d) of the Antidumping Act of 1921 provides:

> (2) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the Commission, upon making its determination under subsection (a) of this section, shall publish in the Federal Register such determination, whether affirmative or negative, *together with a complete statement of findings and conclusions, and the reasons or bases therefor,* on all the material issues of fact or law presented (consistent with confidential treatment granted by the Secretary or the Commission, as the case may be, in the course of making its determination). [Italic added.] Public Law 93–618, section 321(a)(2), 88 Stat. 2041, 2043 (1974) (19 U.S.C. 160(d)(2)).

The statute explicitly directs the Commission to include in its determination a *complete* statement of findings and conclusions, *and* the reasons or bases for those findings and conclusions.

The language used in this two-fold statutory command is patterned after the Administrative Procedure Act, 5 U.S.C. 557(c), which requires that certain administrative decisions include a statement of "findings and conclusions, and the reasons or bases therefor." To this APA language, Congress, in the Trade Act of 1974, added the word "complete" to make clear its intention concerning ITC determinations.

In the legislative history of the Trade Act of 1974, the Senate Finance Committee indicated the intended purpose of the additional statutory requirement for a "complete" statement of findings and conclusions:

> *Complete statement of determinations.*—Section 201(c)(2) of the act, as amended by the House bill, would require the Secretary, upon making his LTFV sales determination, and the Commission,

upon making its injury determination under the act, to publish such determinations in the Federal Register and include a statement of findings and conclusions, and the reasons or bases thereof, on all material issues of fact or law presented. The committee amended this provision (section 201 (d) (2) of the act under the committee bill) to require that the statement published be a *complete* statement, and to permit procedures consistent with confidential treatment granted by the Secretary or the Commission. *In adding the word "complete" to the bill, the committee is making clear its intent that sufficient information be provided in the case of each determination to enable all interested parties to be aware of the reasons for, and details of, such determinations and to effectively protect their rights in proceedings before the Department of the Treasury and the Commission, as well as in the courts.* [Italic added.] S.R. 93–1298 at 171, U.S. Code Cong. & Ad. News, 1974, vol. 4, p. 7186.

Elsewhere in its report, the Finance Committee again expressly indicated its expectations concerning the required clarity of these determinations:

> The committee believes strongly that Commission determinations under this and other statutes, ought to be clear, well documented, and, nearly as possible, decisive. S.R. 93–1298 at 121.

Although this action was commenced prior to the enactment of the Trade Agreements Act of 1979, its legislative history, nevertheless, indicates a continuing congressional intention to require ITC determinations to be sufficiently specific to enable the courts to determine whether the facts support the findings.

In considering the proposed Trade Agreements Act of 1979, the House Committee on Ways and Means reviewed the affirmative and negative decisions of the ITC over the past five years. The committee concluded that the decisions, on the whole, have been consistent with a "material injury" test, and expressed its intention to have that standard continue. Significantly, the committee noted:

> However, this statement does not indicate approval of all the affirmative or negative decisions of the ITC with respect to the issue of injury, *as judgments as to whether the facts in a particular case actually support a finding of injury are for the ITC and the courts to determine.* [Italic added.] H.R. 96–317 at 46 (1979).

The committee also expressed its expectations on the specificity required of determinations made by the ITC:

> It is expected that in its investigation the ITC will continue to focus on the conditions of trade and development within the industry concerned. For one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant. Similarly, for one type of product, price may be the key factor in determining the amount of sales elasticity, and a small price differential resulting from the amount of the subsidy or the margin of

> dumping can be decisive; in others the size of the margin may be of lesser significance. *For this reason the committee intends that the ITC determination, as well as any dissenting or separate views of the individual commissioners, be specific in his statement of findings of fact and conclusions of law.* [Italic added.] Ibid.

Whenever reasons are required of administrators for their decisions, the Supreme Court has indicated the purpose for the articulation of reasons, and the degree of specificity required in the statement of reasons.

In *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 93 S. Ct. 2367 (1973), the Supreme Court reaffirmed the rule of the *Chenery* cases, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454 (1943); 332 U.S. 194, 67 S. Ct. 1575 (1947), and stated:

> [T]his Court has relied on the "simple but fundamental rule of administrative law," *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), that the agency must set forth clearly the grounds on which it acted. For "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935). See also *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. *Id.*, at 88. 412 U.S. at 807.

Significantly, in *Atchison* the Supreme Court recognized that even where the Court's review is limited (as in Interstate Commerce Commission rate cases), the Court, nevertheless, "must be able to discern in the Commission's actions the policy it is now pursuing, so that it may complete the task of judicial review—in this regard, to determine whether the Commission's policies are consistent with its mandate from Congress." 412 U.S. at 805–806.

Schaffer Transportation Co. v. *United States*, 355 U.S. 83, 78 S. Ct. 173 (1957), teaches that even when Congress has given wide authority to a Commission, it is the duty of a reviewing court to insure that the Commission's actions are harmonious with the national policy expressed in the enabling act. In the language of the Supreme Court:

> To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress. 355 U.S. at 88.

Although Mr. Justice Frankfurter dissented in *Schaffer*, and stated

that Congress gave the Commission the widest area for exercising its experience and left very little room for judicial review, he nevertheless expressed the view that the majority opinion:

> * * * may serve a useful purpose if it will lead the Interstate Commerce Commission, despite its enormous volume of business, to *a more detailed and illuminating formulation of the reasons for the judgment that it reaches* even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action. [Italic added.] 355 U.S. at 95.

More recently, the Supreme Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286, 95 S. Ct. 438 (1974) referred to its decision in the second *Chenery* case (332 U.S. 194 (1947)) and said that it would "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." In *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168, 83 S. Ct. 239 (1962), the Supreme Court, however, indicated that it would not uphold a decision if the agency did not "articulate any rational connection between the facts found and the choice made."

In *Burlington*, Mr. Justice White, in reviewing an order of the Interstate Commerce Commission, observed that:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. * * * Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion). [Italic in original.] 371 U.S. at 167.

The rationale for requiring an agency to articulate its reasons has been expressed by the U.S. Court of Appeals for the District of Columbia. Distinguishing between findings and reasons, the court, in *Citizens Association of Georgetown, Inc.* v. *Zoning Commission of the District of Columbia*, 477 F. 2d 402 (D.C. Cir. 1973), stated:

> Reasons differ from findings in that reasons relate to law, policy, and discretion rather than to facts and even where findings are not required, a disclosure of an agency's reasons is often desirable. 477 F. 2d at 409.

More recently, that court, in *Matlovich* v. *Secretary of the Air Force*, 591 F. 2d 852, 857 (D.C. 1978), highlighted "the need for the court, and the complaining party, to be given some helpful insight into the agency's reasoning."

In cases in which an administrative agency's determination must include the agency's "findings," the courts distinguish between basic findings and ultimate findings.

The Supreme Court has stated that, "[t]he ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact." *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569 (1937).

It is not sufficient if an administrative decision states only ultimate findings. The decision must include "the evidential, rather than the ultimate facts; that is to say, the primary facts from which, through a process of reasoning and inference, the ultimate facts may be determined." *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 427, 35 S. Ct. 328 (1915). An ultimate finding in the statutory language is not enough in the absence of a basic finding to support it. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 533, 66 S. Ct. 687 (1946).

Basic findings, those which support the ultimate findings, must be more detailed than the ultimate findings. In the words of the Supreme Court:

> We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. [Citations.] *Colorado-Wyoming Gas Co.* v. *FPC*, 324 U.S. 626, 634, 65 S. Ct. 850 (1945). See also *Morgan* v. *United States*, 298 U.S. 468, 480, 56 S. Ct. 906 (1936).

In his treatise on *Administrative Law*, vol. 2, section 16.06, Professor Davis explains:

> An ultimate fact is usually expressed in the language of a statutory standard. Examples: The rate is reasonable; the applicant is fit, willing and able to provide the service; the action is in the public interest; the respondent has refused to bargain collectively; the injury occurred in the course of employment. * * *
>
> The basic findings are those on which the ultimate finding rests; the basic findings are more detailed than the ultimate finding but less detailed than a summary of the evidence.

The distinction between basic or underlying facts, and ultimate facts, was described in *Saginaw Broadcasting Co.* v. *FCC*, 96 F. 2d 554 (D.C. Cir. 1938), *cert. den.*, 305 U.S. 613 (1938). In *Saginaw*, the Court of Appeals for the District of Columbia Circuit stated:

> In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) Evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion. 96 F. 2d at 559.

These authorities, together with the specific statutory directions pertaining to ITC determinations, establish the criteria against which the ITC's no-injury determination may be tested in determining whether the agency decision is adequate to enable this court to perform its review function.

In this case, the ITC's determination was based upon information it gathered upon its own initiative, as well as upon a hearing in which the parties appeared with counsel. At the hearing, evidence was taken, testimony was given under oath, the parties had the opportunity to cross-examine witnesses,[2] and a full transcript of the proceedings was made. Consequently, the ITC determination was at least partially made upon the basis of a record. Clearly, under the pertinent authorities, the court may scrutinize the record closely in order to perform its function of judicial review. See, e.g., *Ethyl Corporation* v. *Environmental Protection Agency, supra.*

The ITC, by a vote of 3 to 2, with one commissioner abstaining, determined that an industry in the United States is not being injured or is not likely to be injured by reason of the importation and sale at less than fair value of portable electric typewriters from Japan.

In support of its no-injury conclusion, the majority, in its "Statement of Reasons," addressed two issues relevant here:

1. What is the "industry" most likely to be affected by the imported electric typewriters?

2. Is import penetration of a market alone a basis for finding "injury"?

The legislative history of the Trade Act of 1974 is set out in "U.S. Code Congressional and Administrative News," 1974, vol. 4, pp. 7186 et seq., and includes S.R. 93–1298 of the Senate Finance Committee. In discussing the concepts of "injury" and "industry," the Finance Committee explained:

> *Certain concepts and terms associated with Antidumping Act practices.*—The committee received proposals to include statutory language regarding certain concepts and terms, such as "technical dumping," industry, injury, causation linkages, and reconsideration of agency determinations and findings, embodied in the Antidumping Act. These proposals were not accepted for the reason that the committee believes the matters involved are adequately treated under existing practices and are best left to individual case determinations without additional statutory guidelines. * * *
>
> Conceptually, the Antidumping Act is not directed toward forcing foreign suppliers to sell in the U.S. market at the same prices that they sell at in their home markets. Rather, the Act is

[2] In *Pasco Terminals, Inc.* v. *United States*, 477 F. Supp. 201, 83 Cust. Ct. 65 (1979), *appeal pending*, Judge Maletz emphasized the fact-finding nature of ITC proceedings in order to support his determination that the parties had no *right* to confrontation and to cross-examination. Id. at 213, 216. In the present case, in which the parties to the ITC proceedings were accorded opportunity to confront adverse witnesses and cross-examine them, the record that was produced is properly before the court.

> primarily concerned with the situation in which the margin of dumping contributes to underselling the U.S. product in the domestic market, resulting in injury or likelihood of injury to a domestic industry. *Such injury may be manifested by such indicators as suppression or depression of prices, loss of customers, and penetration of the U.S. market.* When clear indication of injury, or likelihood of injury, exists there would be reason for making an affirmative determination. The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry. * * * [Italic added.]
>
> The Antidumping Act refers to "an industry in the United States." There are no qualifications as to the kind of industry or the number of industries that might be adversely affected by the less-than-fair-value imports under consideration. Although the Commission's investigations have usually been concerned with an industry consisting of the domestic-producer facilities engaged in the production of comparable articles (i.e., articles like the imported articles), a number of investigations have been concerned with the domestic facilities engaged in the production of articles which, although unlike the imports, are nevertheless competitive therewith in domestic markets. In any case, the industry is a national industry involving all domestic facilities engaged in the production of the domestic articles involved. S.R. 93–1298 at pp. 178–180.

The majority did not specifically refer to, or rely upon, the "indicators" of injury mentioned in the Finance Committee report. Nevertheless, it discussed "import penetration of the U.S. market," and "acknowledged" that the imports of portable electric typewriters from Japan, sold at less than fair value, obtained a "significant share of the U.S. market for portable typewriters."

The majority, in addressing the issue of market penetration, considered the relevant market to be the market "for portable typewriters," apparently encompassing all portable typewriters including both electric and manual. Since SCM was the sole domestic producer of portable typewriters, both electric and manual, it was perforce the sole domestic supplier of the U.S. market for portable typewriters.

As a factor to be considered in determining injury to an industry, the issue pertaining to import penetration of a market is of obvious significance. Together with suppression or depression of prices and loss of customers, market penetration is one of the three "indicators" of injury specifically mentioned in the Senate Finance Committee report previously quoted.

What is not clear to the court is whether all three indicators, any one of them, or any combination of more than one, must be found before there is adequate reason for making an affirmative injury determination.

Notwithstanding the "acknowledged" fact that the less than fair value imports obtain a "significant share" of the U.S. market, the

majority concluded that "imports penetration alone is not an adequate basis for determining injury."

There is nothing stated in the majority's "Statement of Reasons" to explain that conclusion. The statement that "imports penetration alone" is not an adequate basis for an injury determination may or may not be consistent with legislative intent. Absent a clear articulation of the reasons which led to that conclusion, the court cannot determine whether the ITC has exercised its discretion in a manner which neither deviates from nor does violence to the manifest legislative intent.[3]

The majority, in response to the "what is the industry" issue, considered two alternatives: Either facilities devoted to the production of only *portable* electric typewriters; or, facilities devoted to the production of *all* portable typewriters, both electric and manual. In either instance, the "industry" consisted of the facilities of SCM Corporation, the sole U.S. producer of portable electric and portable manual typewriters. On this issue the majority concluded:

> Our determination in this case would be the same irrespective of whether we considered the U.S. industry to consist of the facilities used in the production of all portable typewriters or only portable electric typewriters. 40 F.R. 27080 (1975).

SCM contends that the ITC erred in failing to consider a third alternative industry, facilities devoted to the production of only portable *manual* typewriters, as a separate industry.

As it appears, there were three alternative industries which could have been considered by the ITC: All portable typewriters, both electric and manual; only portable *electric* typewriters; or only portable *manual* typewriters. In reaching its conclusion as to what was the affected "industry," the majority considered the first two alternatives, but not the third.

The majority in its "Statement of Reasons" sets forth neither findings nor reasons to explain why it limited its choice of "industry" to only two of the three alternatives, and why it excluded from its consideration the portable *manual* typewriter "industry." Hence, the court is not able to determine whether or not the ITC exercised a reasoned discretion consistent with the ascertainable legislative intent pertaining to an affected "industry" within the meaning of the Antidumping Act.

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[3] At a symposium on the Tokyo Round of Multilateral Trade Negotiations (MTN), it was observed that the role of lawyers is to insure that "administrative procedures fully reveal the facts and reasoning upon which official governmental decisions are based, and that judicial review is rigorous and meaningful." Herzstein, "The Role of Law and Lawyers Under the New Multilateral Trade Agreement," in 9 Georgia Journal of International and Comparative Law 177, 205 (1979). In commenting upon the procedural changes made in antidumping proceedings by the Trade Act of 1974, special reference was made to the "more detailed determinations" required under that Act. See address by Deputy Assistant Secretary Suchman, Mar. 11, 1975, before the International Trade Committee of the Federal Bar Association, Washington, D.C., on "The U.S. Antidumping Law: After the Trade Reform Act," in "Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30, 1975," at 358.

Government counsel, in its brief, attempts to supply the reasons missing from the ITC determination by arguing that, due to SCM's dominant position in the domestic portable typewriter industry, it could shift production from portable electric to portable manual typewriters in response to market alterations. Therefore, it submits that the ITC's determination, that all portable typewriter production is an industry, was appropriate.

The obvious answer to government counsel's argument is that it is, at best, a "post hoc rationalization" by counsel which is unacceptable, and cannot be used as a substitute for the ITC's absent or missing reasoning. The Supreme Court has repeatedly refused to accept the arguments of an agency's counsel in appraising the validity of the agency's decisions.

> For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate * * * the administrative process, for the purpose of the rule is to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U.S., at 196. [*Securities Commission* v. *Chenery Corp.*] *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169, 83 S. Ct. 239 (1962).

As stated in *Investment Company Institute* v. *Camp, Comptroller of the Currency*, 401 U.S. 617, 628, 91 S. Ct. 1091 (1971):

> Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.

In passing upon an ITC final determination, this court cannot, and should not, attempt to act as a "superagency" adjudicating *de novo* the controversy which Congress has assigned to the ITC for determination. The court, however, can and should require the ITC to perform its assigned responsibility as directed by the applicable statutory provisions.

Congress has not only directed the ITC to *state* its determinations but has also required the agency to *explain* those determinations. The statutory requirements of "a statement of reasons," imposed by the 1958 amendments to the Antidumping Act, and the "complete statement of findings and conclusions" imposed by the Trade Act of 1974, are clearly consistent with applicable decisional law. For the ITC these requirements are specifically mandated by the pertinent statutory provisions.

The ITC determination in this case nominally includes the majority's "Statement of Reasons." In substance, however, the statements are really mixed conclusions of ultimate facts and statutory interpretation, rather than reasons. The ITC has stated the conclusions which presumably are the result of its reasoning, but it has

neither supplied nor articulated the reasons which support those conclusions.

An illustration is the conclusion that significant market penetration alone is not an adequate basis for determining injury. This is a major policy determination with broad and significant implications in the interpretation and administration of the antidumping law. Clearly, Congress intended the ITC to develop and refine the very general concept of injury as it is applied to individual cases. This responsibility is not adequately discharged in a case in which the ITC determination is neither clearer nor more specific than the statutory language itself.

When the ITC fails to delineate and make explicit the basis for its conclusions, by articulating a rational connection between the facts found and the discretionary action taken, the court cannot decide, as it must, whether the ITC has exercised a reasoned discretion consistant with legislative intent.

In order for the court to perform its function of judicial review, this proceeding is stayed, and the ITC will be afforded an additional opportunity to supply this court with the reasons supporting its conclusions. See *United States* v. *Bianchi & Co.*, 373 U.S. 709, 718, 83 S.Ct. 1409 (1963). Cf. *Camp* v. *Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241 (1973).

Accordingly, it is ordered that this proceeding be stayed for such necessary time, not to exceed 90 days, as the ITC may require to supply the court with a more specific and explicit statement of reasons for the conclusions that: (1) The affected "industry" was limited to, alternatively, the facilities devoted to the production of all portable typewriters, or, the production of portable electric typewriters; and, (2) significant market penetration by less than fair value imports alone is not an adequate basis for determining injury.

(C.R.D. 80-3)

SPRAGUE ELECTRIC COMPANY, PLAINTIFF *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST), DEFENDANT

On Plaintiff's Motion and Government's Cross-Motion for Summary Judgment

Court No. 77-9-03056

[Action stayed pending reconsideration by Commission of negative injury determination.]

(Dated March 27, 1980)

Frederick L. Ikenson, Esq., for the plaintiff.

Alice Daniel, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Joseph I. Liebman*, Attorney in Charge, Field Office

for Customs Litigation, and *Sidney N. Weiss*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge:

INTRODUCTION

Plaintiff, an American manufacturer of tantalum electrolytic fixed capacitors, challenges the negative injury determination of the U.S. International Trade Commission (Commission) in investigation No. AA1921–159 (41 F.R. 47604 (1976)), under the Antidumping Act of 1921, as amended (19 U.S.C. 160, et seq. (1970)). That investigation involved tantalum electrolytic fixed capacitors imported from Japan which the Department of the Treasury (Treasury) had determined were being or were likely to be sold in the United States at less than fair value (LTFV) within the meaning of the Antidumping Act, as amended. This suit has been brought under the provisions of 28 U.S.C. 1582(b) (1976), 28 U.S.C. 2632(a) (1976), and 19 U.S.C. 1516(c) (1976).

Capar Components Corp., the party in interest, is the consignee in New York Seaport consumption entry No. K 429821–77 of August 5, 1977, who imported tantalum electrolytic fixed capacitors from Japan without assessment of antidumping duties, and who has been made a party pursuant to 19 U.S.C. 1516(c) (1976). Under 19 U.S.C. 1516(f) (1976), the consignee or his agent has the right to appear and be heard as a party in interest in an action brought by an American manufacturer pursuant to section 1516. However, Capar Components Corp. has not participated in the defense of this case.

Presently before the court are plaintiff's motion and the Government's cross-motion for summary judgment. For the reasons that follow, proceedings in this action shall be stayed pending reconsideration by the Commission of its negative determination in investigation No. AA1921–159.

BACKGROUND

The pertinent facts concerning the administrative proceedings leading to the initiation of this action are undisputed, and may be summarized chronologically:

1. On September 24, 1975, plaintiff, through counsel, submitted a complaint to the Commissioner of Customs alleging that tantalum electrolytic fixed capacitors from Japan were being sold at LTFV within the meaning of the Antidumping Act of 1921, as amended.

2. On October 17, 1975, Treasury issued a notice that an investigation had been instituted to determine whether tantalum electrolytic fixed capacitors from Japan were being or were likely to be sold at LTFV (40 F.R. 48702).

3. On April 23, 1976, a withholding of appraisement notice covering

tantalum electrolytic fixed capacitors from Japan issued by Treasury was published in the Federal Register (41 F.R. 16983).

4. On July 27, 1976, an affirmative determination of sales at LTFV covering tantalum electrolytic fixed capacitors from Japan (other than those produced and sold by Matsushita Electric Industrial Co., Ltd.) was issued by Treasury and published in the Federal Register (41 F.R. 31240).

5. On August 3, 1976, the Commission instituted investigation No. AA1921–159 to determine whether an industry in the United States was being or was likely to be injured, or prevented from being established, by reason of the importation of tantalum electrolytic fixed capacitors from Japan at LTFV. Notice of the institution of the investigation and of the public hearing was published in the Federal Register on August 9, 1976 (41 F.R. 33337).

6. On October 22, 1976, the Commission, by a vote of 5 to 1, reached a negative determination, viz, the Commission majority determined that an industry in the United States was not being and was not likely to be injured, or prevented from being established, by reason of the imports at LTFV. The decision, together with a statement of reasons, was published in the Federal Register on October 29, 1976 (41 F.R. 47604). The Commission stated that in arriving at its determination, it "gave due consideration to written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission's staff from questionnaires, personal interviews and other sources" (ibid.).

7. During the Commission's investigation, counsel for plaintiff informed the Commission at the hearing held on September 8, 1976, of the likelihood that the import statistics for tantalum electrolytic fixed capacitors from Japan were inaccurate and underrepresented the true volume of such imports. Document No. 52 at 30–31, hearing transcript (Public).

8. On June 13, 1977, after the Commission announced its negative determination in this case, the Commission was informed by its Director of Industries that the investigation was "yet another example of substantially erroneous official import statistics being used by the Commission and its staff during the course of public investigations." The Foreign Trade Division of the Bureau of the Census conducted an investigation of the accuracy of import statistics for tantalum electrolytic fixed capacitors from Japan by calendar quarters for 1975 through mid-1977. The investigation showed that for 1975 the actual volume of such imports was 21,814,079 units, whereas the erroneously reported volume of such imports during 1975, upon which the Commission relied, was 14,948,243 units. This translates into an increase in market penetration from 4.6 percent to 6.6 percent. Further, the investigation showed that for the first half of 1976 the actual volume

of such imports was 19,328,083 units, whereas the erroneously reported volume of such imports during this period upon which the Commission relied was 13,769,411 units.

9. On July 21, 1978, the Commission's General Counsel raised with the Commission the possibility of reconsidering its determination in light of the erroneous import statistics relied upon by the Commission and its staff.

10. On August 22, 1978, the Commission published in the Federal Register notice of the erroneous import statistics and invited the public to comment upon "whether the Commission's reliance on erroneous official statistics justifies further Commission action with respect to its determination in investigation No. AA1921–159" (43 F.R. 37233).

11. On February 9, 1979, the Commission published notice in the Federal Register that no further action would be taken with respect to its negative determination in investigation No. AA1921–159 (44 F.R. 8359). No reason was given by the Commission for not taking further action.

No question is presented concerning plaintiff's compliance with the administrative prerequisites to the initiation of a civil action prescribed by 19 U.S.C. 1516 (a) and (c).

During the discovery phase of this litigation, plaintiff sought, inter alia, production of "All documents and things in the files of the International Trade Commission and/or individual Commissioners, pertaining to the Commission investigation No. AA1921–159 * * *." Defendant moved for a protective order prohibiting plaintiff from conducting discovery into matters beyond the Commission's notice of investigation and hearing (41 F.R. 33337–38 (1976)) and the Commission's negative injury determination and statement of reasons (41 F.R. 47604–07 (1976)). Defendant's motion was decided by this court on June 27, 1978, culminating in an order which, in pertinent part, reads (80 Cust. Ct. 256, 257, C.R.D. 78–7 (1978)):

> 2. That the Secretary of the U.S. International Trade Commission, Kenneth R. Mason, shall prepare and transmit to Joseph E. Lombardi, clerk of the U.S. Customs Court, on or before July 28, 1978, the following: (1) A certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921–159; (2) certified copies of all written submissions, questionnaires, reports and all other documents relating to investigation AA1921–159; and (3) all other things in the files of the Commission relating to the investigation. *Cf.* Judge Maletz' order in *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978), and also his unpublished order in the same case entered on May 8, 1978. See also my order in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 80 Cust. Ct. 252, C.R.D. 78–5 (1978), entered concurrently herewith.

3. That denial of defendant's present motion for a protective order shall be without prejudice to renewal respecting any documents or things that were received by the Commission on a confidential basis or are otherwise privileged.

4. That the basis of this order is to enable the court to determine whether or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law. See, e.g., *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct. 19, C.D. 4708, 435 F. Supp. 389 (1977); *cf. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). See also questions and answers attached to the letter of Daniel Minchew, Chairman, U.S. International Trade Commission, November 16, 1977, reproduced in *Hearing before the Subcommittee on Trade, House Committee on Ways and Means, on the Adequacy and the Administration of the Antidumping Act of 1921* (95th Cong., 1st sess. 1977), pages 65–66.

Pursuant to the foregoing order, as modified, the Secretary of the Commission transmitted what are represented to be all of the documents and things enumerated and described above that were locatable, with the exception of seven documents that were claimed by the Commission Chairman to be privileged.[1]

PARTIES' CONTENTIONS

Plaintiff contends that the Commission reached a negative injury determination by misinterpreting and misapplying the law. Specifically, plaintiff urges that the Commission "impermissibly fragmented the relevant product group of LTFV imports and considered the impact of such subgroups rather than the impact of the total group" (memorandum at 15). Further, plaintiff maintains that even if the Commission did not misapply the law, "the findings of fact upon which the Commission based its negative determination are arbitrary and capricious, and not supported by substantial evidence" (ibid). Finally, plaintiff seeks to overturn the Commission's determination on the basis that "it has been admitted by the Commission that the import statistics it relied upon were false and underrepresented the true magnitude of LTFV imports" (ibid). Hence,

[1] The order of June 27, 1978, was modified by a protective order entered on Aug. 1, 1978, and was further modified in an order entered on Dec. 27, 1978, wherein a claim of privilege was sustained respecting 7 documents. 81 Cust. Ct. 168, C.R.D. 78-18, 462 F. Supp. 966 (1978). In an order entered on Jan. 25, 1979, a claim of privilege was denied as to a portion of 1 other document, which was made available to plaintiff's counsel in its entirety. 82 Cust. Ct. 304, C.R.D. 79-4 (1979).

The documents and things comprising the administrative record are listed on 2 numbered indexes, which were also transmitted to the court, entitled "List No. 1, Public Documents Transmitted to the U.S. Customs Court," and "List No. 2, Confidential Documents Transmitted to the U.S. Customs Court." Public documents are identified on list No. 1, while those documents which the Commission treated as containing confidential business information and which are subject to the terms of the protective order entered on Aug. 1, 1978, are identified on list No. 2.

plaintiff seeks an order setting aside the Commission's determination and directing Treasury to publish a finding of dumping, with the result that dumping duties will be assessed, where appropriate, on entries of the subject capacitors from Japan.

Defendant advances the argument that the court is limited to a review of the Commission's statement of reasons in deciding whether the Commission's determination is arbitrary, capricious, or otherwise contrary to law. Relying upon the foregoing scope and standard of review, defendant urges that in its statement of reasons, the Commission (majority) applied proper legal criteria and considered appropriate indicia of injury, and therefore its determination is not arbitrary, capricious, or otherwise contrary to law. Moreover, defendant contends that the Commission's determination is supported by the administrative record. Finally, defendant posits that the Commission properly limited its investigation to the impact on the domestic industry of the LTFV imports; and that the erroneous import statistics relied on by the Commission had no material bearing on the Commission's negative determination.

OPINION

I

The scope and standard of review pertaining to the Commission's injury determinations under the Antidumping Act were addressed in my recent opinions in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 84 Cust. Ct. 16, C.D. 4838 (1980), *appeal pending*, and *Armstrong Bros. Tool Co. et al.* v. *United States* (*Great Neck Saw Manufacturing, Incorporated, Party-in-Interest*), 84 Cust. Ct. 102, C.D. 4848 (1980). That discussion is fully applicable in the present case. To briefly reiterate, the Court of Customs and Patent Appeals has stressed that "(t)he courts have a very limited power of review over the Commission's (injury) determinations"; and, "(i)t is not the judicial function to review or to weigh the evidence before the Commission or to question the correctness of findings drawn therefrom." *City Lumber Co. et al.* v. *United States*, 59 CCPA 89, 92, C.A.D. 1045, 457 F. 2d 991 (1972). See also *Imbert Imports, Inc., et al.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *Kleberg & Co. (Inc.)* v. *United States*, 21 CCPA 110, T.D. 46446 (1933). The foregoing decisions and other cases cited and discussed in the first *Armstrong* opinion teach that this court may not substitute its judgment in factual matters for that of the Commission, and the relative weight to be given to the various criteria of injury considered by the Commission is a matter for that agency's discretion and expert judgment.

Additionally, in the first *Armstrong* case, I emphasized the complex nature of an injury determination under the Antidumping Act, and

the intent of Congress to provide the Commission with a wide latitude within which to make its determination on a case-by-case basis. But there is no dispute that the Commission's determination may be set aside if arbitrary, capricious or otherwise contrary to law, as held in the *Armstrong* cases.

II

Here, the statement of reasons by the Commission (majority) discussed five criteria of injury (market penetration of LTFV sales, U.S. shipments, lost sales, profits, and prices) and found that any injury which the domestic industry may have experienced, or may be likely to experience, "is not by reason of LTFV imports" (41 F.R. 47605). Accordingly, the Commission determined that since the condition of causation imposed by the statute was not satisfied, a negative determination was required.

The Commission, in its discussion of market penetration of LTFV sales, stated (41 F.R. 47605):

> (I)n determining the impact of LTFV sales of tantalum capacitors from Japan on the relevant U.S. industry, we have excluded from consideration imports of tantalum capacitors of Matsushita Electric Industrial Co., Ltd., as Treasury has done from its LTFV determination, and have considered the impact of 35 percent of the remaining tantalum capacitor imports from Japan, since this is the percentage which Treasury actually found to be sold at LTFV after looking at about 75 percent of such imports during the period of investigation. References to import statistics and import penetration in this statement reflect this finding.

The Commission then observed that the penetration of LTFV imports of tantalum capacitors from Japan declined from about 2 percent for 1974 to less than 1.5 percent for 1975.

Continuing, the Commission noted the decline in U.S. producers' shipments of tantalum capacitors and found:

> This 32-percent decline in U.S. producers' shipments in that year (1975) was attributable to the recession and not to LTFV imports, which not only declined by 50 percent in absolute quantity but also experienced a market decline in their already minimal market share in 1975, as noted above.

Lost sales by the domestic industry were not attributable to the LTFV imports according to the Commission:

> *Lost sales.*—A thorough examination of transactions in the original equipment manufacturers (OEM) market in the United States in 1975, covering 67 percent of the value of Japanese imports in that year, reveals that a Japanese-made tantalum capacitor was priced below an American-made capacitor in 25 percent of the instances in which they met in the OEM market. In two-thirds of those instances, however, the Japanese-made capacitor was not purchased.
>
> Although one Japanese supplier of LTFV imports consistently undersold U.S. producers with respect to one type of capacitor

330-630 O - 81 - 17

sold to one particular OEM account, the quantity of its U.S. sales of this capacitor was so small that it could not be an identifiable cause of adverse impact on the domestic industry.

Although profits of the domestic industry on their tantalum capacitor operations declined significantly from 1973 to 1975, the Commission majority found that the LTFV imports could not be blamed for the decline. The Commission observed that 1975 was "a year in which imports of these articles from Japan declined sharply, and where market penetration was very low." Furthermore, the Commission noted that "despite the significant decline in profits in recession year 1975, U.S. tantalum capacitor operations were twice as profitable as the operations of all manufacturers of electrical and electronic equipment in that year." The Commission expected the profits of the U.S. producers to return to the higher levels that prevailed in 1973 and 1974, with continued improvement in demand for capacitors in 1976.

With respect to prices, the Commission found:

> *Prices.*—The quantities of sales per order of the Japanese-made tantalum capacitors have been small compared with the quantities of sales of U.S. producers of tantalum capacitors. In general, Japanese sales did not exceed 100,000 to 200,000 units per month, whereas orders placed with U.S. producers were frequently for 1 million or more units per month. While price plays a significant role in what company receives the order, the effect of the small-sized orders for the Japanese tantalum capacitors is insignificant on prices of the total U.S. industry. The small decline in U.S. producers' prices for some types of tantalum capacitors in late 1975 and early 1976 from a peak in 1974 stemmed from the decreased demand occurring after a substantial buildup in inventories by OEM purchasers in 1974 and 1975 and not from LTFV imports.

Finally, the Commission majority found there was no likelihood of injury as a result of the LTFV imports, notwithstanding a planned expansion of Japanese capacity to produce tantalum capacitors in 1976 and 1977, and an anticipated increase in 1977 exports by one Japanese producer. The Commission noted that during the first half of 1976, domestic shipments increased 38 percent, and continued growth in U.S. demand was anticipated. Continuing, the Commission observed:

> The projected sharp growth in demand for tantalum capacitors is not confined to the United States but is expected to occur also in Japan and other major markets. Thus, only a limited share of the increased production in Japan will be available for export to the United States. Under these conditions, even though the Japanese increase their exports to the United States, it is doubtful that they will increase their share of the expanding U.S. market for tantalum capacitors to the extent that such imports from Japan would be an identifiable cause of any injury which the relevant domestic industry may suffer in the future.

In dissent, Commissioner Parker submitted a separate statement of reasons for an affirmative determination of likelihood of injury. In support of his affirmative determination, Commissioner Parker noted the increased Japanese capacity to produce tantalum capacitors, the planned increases in Japanese exports, and the expected intensification of competition between the domestic producers and the Japanese exporters.

III

In its statement of reasons, the Commission (majority) considered reasonable criteria in determining whether injury or the likelihood thereof existed. It is readily apparent from the majority's factual findings that the domestic tantalum capacitor industry was experiencing several adverse economic developments. Nevertheless, the administrative record before the Commission at the time of its determination shows a rational basis for the Commission's conclusion: "Any injury which the domestic industry may be experiencing or may be likely to experience is not by reason of LTFV imports." However, the deeply disturbing fact remains that the Commission in making its determination relied upon substantially erroneous import statistics provided by the Bureau of Census which grossly understated the true volume of tantalum capacitor imports,[2] and that the Commission's notice of February 9, 1979 (44 F.R. 8359), states, without giving any reason, that no further action would be taken respecting its original negative determination. Inasmuch as the official statistics before the Commission at the time of its determination grossly understated the tantalum electrolytic fixed capacitor imports, and the LTFV imports comprised a certain percentage of the former (viz, 35 percent), it logically follows that the LTFV imports and the domestic consumption thereof were substantially greater than the figures assumed by the Commission.

Under the Antidumping Act the Commission is charged by Congress with the responsibility for making an investigation, evaluating pertinent economic data bearing upon the question of injury or the likelihood thereof, and making a determination, either affirmative or negative. Whether the true volume of LTFV imports disclosed by the corrected statistics would warrant a finding by the Commission that there was injury "by reason of" sales at LTFV, and thus compel an affirmative determination, is a matter for the Commission's consideration and expert judgment. If, in light of the correct import statistics, the Commission can still demonstrate a rational basis for a negative determination, this court will be obliged to sustain such determination.

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[2] Certified copy of memorandum dated June 13, 1977, annexed to plaintiff's brief as part of collective exhibit 2.

I agree with defendant's contention that if the Commission's original determination cannot be sustained by the court because of the incorrect import statistics, an appropriate remedy would be to stay the proceedings in this court pending a new determination by the Commission in light of the correct statistical information. See *United States* v. *Bianchi & Co.*, 373 U.S. 709, 718 (1963). See also *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). *Cf. SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 84 Cust. Ct. 227, C.R.D. 80–2 (1980); *Voss International Corp.* v. *United States*, 78 Cust. Ct. 130, C.D. 4698, 432 F. Supp. 205 (1977) (case remanded to Commission at previous stage in the proceeding).

Inasmuch as the Commission was informed of its use of erroneous import statistics but nonetheless declined to take further action, without explanation, defendant's reliance upon the well established rule that an administrative decision may not be judicially overturned on the basis of a new record made initially in the reviewing court[3] is patently misplaced.

IV

As we have seen, the Commission majority noted in its statement of reasons that:

> (I)n determining the impact of LTFV sales of tantalum capacitors from Japan on the relevant U.S. industry, we have excluded from consideration imports of tantalum capacitors of Matsushita Electric Industrial Co., Ltd., as Treasury has done from its LTFV determination, and have considered the impact of 35 percent of the remaining tantalum capacitor imports from Japan, since this is the percentage which Treasury actually found to be sold at LTFV after looking at about 75 percent of such imports during the period of investigation. References to import statistics and import penetration in this statement reflect this finding.

We now turn to plaintiff's argument that the majority of the Commission "impermissibly fragmented the relevant product group." On this score, plaintiff contends that the Commission was required by the Antidumping Act to consider the impact on the domestic industry of the entire class or kind of merchandise involved, whether or not sold at LTFV (other than the capacitors produced and sold by Matsushita). Defendant, however, insists that the Commission acted properly in considering the impact on the domestic industry of only the LTFV imports. I agree with defendant's construction of the statute.

The Antidumping Act requires the Treasury to advise the Commission whenever it "determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States * * *

[3] See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1975), and cases cited.

at less than its fair value * * *." The Commission is thereupon directed to "determine * * * whether an industry in the United States is being or is likely to be injured * * * by reason of the importation of such merchandise into the United States." 19 U.S.C. 160(a).

The statute, essentially, is intended to protect the domestic industry from international price discrimination, and requires a finding by the Commission that injury, or the likelihood thereof, is "by reason of" imports at LTFV. As recently stated by Chief Judge Re in his well-reasoned decision in *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), *supra:*

> If the Secretary issues an affirmative finding of sales at less than fair value, the matter is referred to the International Trade Commission. The Commission must then determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, *by reason of the less than fair value sales.* * * * [Italic added.]

Thus, the act is not designed to ameliorate all of the effects of import competition, and the Commission is required to focus its investigation on the impact of LTFV imports. Plaintiff's reading of the statute would require the Commission to investigate the impact of the entire class or kind of merchandise involved in Treasury's LTFV investigation, notwithstanding that Treasury may have found LTFV margins on only a percentage of the imports investigated.[4] Plainly, this interpretation was not intended by Congress. In this connection, it may be noted that Congress has provided different forms of relief, other than the Antidumping Act, for imports sold at fair value. See e.g., sections 201 and 406 of the Trade Act of 1974.

While the statute provides that Treasury must determine whether a "class or kind of foreign merchandise" is being or is likely to be sold at LTFV, I am clear that it is the LTFV imports that must be the subject of the Commission's injury investigation.[5] Accordingly, I conclude that the Commission majority did not err in considering the impact of only the percentage of imports of tantalum electrolytic capacitors from Japan which Treasury actually found to be sold at LTFV.

Footnote 3 of the majority's statement of reasons states (41 F.R. 47605):

> During the investigation the Commission learned that Nippon Electric Co. (NEC) intended to increase its exports of tantalum

[4] Hence, plaintiff's position, if carried to its logical conclusion, would require the Commission to investigate the impact on the domestic industry of 100 percent of the class or kind of merchandise involved in Treasury LTFV investigation even though only 1 percent of the involved merchandise was found by Treasury to be sold at LTFV.

[5] Although the statute makes injury by reason of LTFV imports the focus of the Commission's antidumping investigation, the Commission clearly has discretionary authority to investigate whether imports of the same class or kind sold at fair value are potentiating the capacity of the LTFV imports to cause injury.

> capacitors to the United States significantly during 1977. However, the increase in such exports to the United States (estimated to be several millions of units) will consist almost entirely of epoxy dipped fixed capacitors. Information furnished to the Commission by the Department of the Treasury contained in a letter dated July 7, 1976, from the U.S. Customs Service to Assistant Secretary David R. Macdonald, states "NEC sold hermetically sealed and epoxy dipped capacitors and margins were found only on the hermetically sealed capacitors." *Therefore, since no LTFV margins were found in NEC sales of epoxy dipped capacitors, Commissioners Moore and Bedell believe that NEC's anticipated increase in exports of such capacitors to the United States should not be used as a basis for a finding of likelihood of injury.* [Italic added.]

For the same reason I concluded that the Commission majority did not err in investigating the impact on the domestic industry of only the LTFV imports, I agree with the approach of Commissioner Moore and Commissioner (now Chairman) Bedell in their finding of no likelihood of injury. Since Treasury found no LTFV margins on Nippon's sales of epoxy dipped capacitors,[6] the anticipated increase in exports of such capacitors to the United States should not be used as a basis for a finding of likelihood of injury. Stated differently, since no margins were found by Treasury on Nippon's sales of epoxy dipped capacitors, there could be no basis under the statute for finding that any likelihood of injury was "by reason of the importation of such merchandise (LTFV imports) into the United States."

CONCLUSION

For the reasons stated herein, it is hereby ordered that:

1. Plaintiff's motion and defendant's cross-motion for summary judgment are denied at this time;

2. Proceedings in the instant case shall be stayed pending a reconsideration by the Commission of its original determination in investigation No. AA1921–159 and the taking of a new vote on the question of whether, in light of the correct import statistics for tantalum electrolytic fixed capacitors from Japan, sales of such merchandise at LTFV were injuring or were likely to injure an industry in the United States within the meaning of the Antidumping Act of 1921, as amended; and the Commission may conduct any further proceedings which it deems appropriate, but consistent with this order;

3. The Commission shall, through counsel for defendant, submit to the court within 90 days from the date of entry of this order its new determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefor, on all material issues of fact or law presented, including the

[6] Notwithstanding that Treasury found no margins on the sale of Nippon's epoxy dipped capacitors, Treasury declined to grant Nippon's request to have the LTFV determination severed between different types of tantalum capacitors and, in effect, to eliminate from Treasury's LTFV determination tantalum electrolytic fixed capacitors identified or described as "dipped."

materiality of the corrected import statistics on the Commission's new determination.

(C.R.D. 80-4)

SHELL OIL CO., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 75-12-03287

Refusal to reliquidate

[Cross-motions for summary judgment denied; motion to dismiss denied.]

(Dated May 6, 1980)

Shaw and Stedina (*Charles P. Deem* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff* on the briefs), for the defendant.

FORD, Judge: This action is before me on cross-motions for summary judgment made pursuant to rule 8.2 of the rules of this court. Defendant has also moved pursuant to rule 4.7(b) of the rules of this court for dismissal of the consolidated action on the ground the court lacks jurisdiction.

The merchandise consists of petroleum products manufactured in the United States by plaintiff and thereafter exported. The primary question presented is whether the exported merchandise, manufactured from acetone and crude wax, is entitled to drawback. In addition, the question of the timeliness of the claims as well as the designation of rates for drawback purposes of the acetone and crude wax is involved. An additional question exists as to whether there are valid grounds for relief under section 520(c)(1) of the Tariff Act of 1930, as amended.

A motion for summary judgment, made pursuant to rule 8.2, which is "ripe" for determination, is premised upon the fact that there is no genuine issue as to any material fact. Plaintiff has set forth 38 paragraphs alleging that no issue of material fact exists, and defendant has set forth 50 paragraphs for the same purpose. Defendant further alleges, but contends it is not material to the decision, a dispute of four paragraphs of plaintiff's statement as to lack of a genuine issue of any material fact. These paragraphs are 15, 18, 26, and 27. Plaintiff disputes seven paragraphs of defendant's statement as to lack of genuine issue of any material fact. They are paragraphs 19, 20, 21, 47, 48, 49, and 50. The court is under no duty to grant summary judgment merely because both parties are under the belief that there are no factual issues to be tried. *C. J. Tower & Sons* v. *United States*, 68 Cust. Ct. 377, C.R.D. 72-11, 343 F. Supp. 1387 (1972); *L. B. Watson* v. *United States*, 75 Cust. Ct. 185, C.R.D. 75-5 (1975).

As indicated, supra, in order for the court to properly entertain a motion for summary judgment, it must be convinced that there are no genuine issues as to any material fact. Aside from the disagreement of the parties with respect to the 11 paragraphs referred to above, the court is of the opinion that other genuine issues of material fact exist, and accordingly the matter is not ripe for summary judgment. *Braniff Airways, Inc.* v. *United States,* 84 Cust. Ct. 11, C.D. 4837 (1980).

Defendant's motion to dismiss for lack of jurisdiction presents, in the opinion of the court, questions which would better be resolved by trial in view of the history of the attempts by plaintiff to obtain a drawback rate.

In view of the foregoing, this action is properly the subject of a trial, and not a motion for summary judgment.

It Is Hereby Ordered that the cross-motions for summary judgment and the motion to dismiss are denied.

(C.R.D. 80–5)

PPG Industries, Inc., plaintiff, *v.* United States, defendant

Memorandum opinion re defendant's motion to dismiss

Consolidated Court No. 77–10–04458

(Dated May 23, 1980)

Eugene L. Stewart for the plaintiff.

Alice Daniel, Assistant Attorney General (*Joseph I. Liebman,* Attorney in Charge, Field Office for Customs Litigation; *James A. Resti,* trial attorney), for the defendant.

Boe, Judge: In the above-entitled consolidated action, the merchandise in question consisting of bipolar diaphragm electrolyzers and parts were entered at the ports of entry at Houston and Galveston, Tex., Philadelphia, Pa., and New Orleans, La., between 1969 and 1973. The plaintiff claiming the merchandise in question through error and mistake was not classified as experimental and, accordingly free from duty, has brought the within action pursuant to sections 1514(a)(7) and 1520(c)(1) and 28 U.S.C. section 1582(a). 19 U.S.C section 1520(c)(1) provides as follows:

> (c) *Reliquidation of entry.*—Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law,

> adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other Customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within 1 year after the date of entry, or transaction, or within 90 days after liquidation or exaction when the liquidation or exaction is made more than 9 months after the date of the entry, or transaction; * * *.

To the action commenced by the plaintiff, the defendant has filed a motion to dismiss for lack of jurisdiction premised on the fact that "requests for reliquidation were not filed within the time period provided for in 19 U.S.C. section 1520(c)(1)."

By order of this court under date of March 21, 1980, a date for oral argument of defendant's motion to dismiss was fixed and determined and at which time the court requested that appropriate evidence be presented by the respective parties as to the following:

> (a) the nature of and the manner by which any alleged clerical error, mistake of fact or other inadvertence, not amounting to any error in the construction of a law, in connection with the liquidation of the merchandise in the above-entitled action was brought to the attention of the Customs Service, together with the date and/or dates thereof, and
>
> (b) the nature and contents of all responses made by the Customs Service relating to the alleged errors, mistakes of fact or inadvertence which may have been brought to their attention together with the date and/or dates thereof.

At the time of oral argument plaintiff submitted an offer of proof and/or a compilation of evidentiary facts together with certain exhibits annexed thereto. In view of the uncertainty expressed by plaintiff's counsel with respect to the intended purport of this court's order requesting an evidentiary hearing, the parties were advised by the court upon completion of argument that after examination of the offer of proof and/or compilation of facts submitted by the plaintiff and the defendant's response to be submitted in connection therewith, a date for an evidentiary hearing subsequently would be determined.

After full consideration of the arguments, the offer of proof and/or compilation of evidentiary facts submitted by the plaintiff, as well as other memoranda submitted by respective counsel, the court is satisfied that the timeliness as to when any error, mistake or inadvertence may have been brought to the attention of the Customs Service is in dispute, and that a preliminary evidentiary hearing will not serve to permit an orderly and complete presentation of the facts required to be determined under the provisions of 19 U.S.C. section 1520(c)(1). From the offer of proof and/or the compilation of facts submitted by the plaintiff at the time of oral argument, as well as from the references made by counsel during argument with respect to the

administrative history [1] relating to many of the entries involved in the within action, it appears that the evidence to be adduced with respect to the compliance with the prerequisites provided in 19 U.S.C. section 1520(c)(1) are inextricably intermeshed with the evidentiary facts relating to the merits of the action. To proceed at this juncture with a preliminary evidentiary hearing predictably will result in a fragmented, piecemeal adjudication of the within action which would prove prejudicial to both the plaintiff and the defendant. Accordingly, the court in its sound discretion deems it proper and in the interest of justice to defer its determination of defendant's motion to dismiss until such time as more full and complete evidence can be submitted through regular trial procedure.

In deferring a determination of defendant's motion until a trial on the merits of the within action, the court is not unmindful of the case of *United States* v. *Boe*, 64 CCPA 11, 15, C.A.D. 1177, 543 F. 2d 141 (1976) nor of the case of *Hambro Automotive Corp.* v. *United States*, C.A.D. 1231, 603 F. 2d 850 (1979). In the former case an attempt of the trial court to retain jurisdiction over the cause of action by the denial of the Government's motion to dismiss for lack of jurisdiction was held to be unwarranted in view of the patent and undisputed premature filing of a protest prior to liquidation. In *Hambro* the record before the trial court was deemed sufficient to justify its affirmative determination of the Government's motion to dismiss for lack of jurisdiction. The refusal of the trial court to receive testimony as to the nature of the alleged mistake was deemed not to be an abuse of discretion.[2] In view of the fact that the nature of the mistake provided for in 19 U.S.C. section 1520(c)(1) could be clearly ascertained from the record and pleadings before the court, the dismissal of the action by the trial court was deemed appropriate.

It is well settled, as urged by the defendant, that, when challenged, it is the burden of the plaintiff to establish the jurisdiction of the court. *Gibbs* v. *Buck*, 307 U.S. 66 (1939). As stated in *Gibbs* v. *Buck*, however, "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." Id. at 71–72.

Thus, in the case of *Land* v. *Dollar*, 330 U.S. 731 (1947), the U.S. Supreme Court stated:

> (A)lthough as a general rule the district court would have authority to consider questions of jurisdiction on the basis of

[1] For example, evidence relating to certain penalty proceedings to which the entries in the within consolidated action were originally involved may be material herein.

[2] No discussion is contained in the *Hambro* case as to the matter of timeliness provided for in 19 U.S.C. 1520(c)(1) nor reference made to its prior decision of *Madden Machine Co.* v. *United States*, 61 CCPA 97, C.A.D. 1130, 499 F. 2d 1294 (1974), wherein the affirmative assertion was made that timeliness of a request to reliquidate under sec. 1520(c)(1) goes to the merits of the district director's refusal to reliquidate.

> affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits. (Id. at 735.)

The Court continued:

> We only hold that the district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits. (Id. at 739.)

It is manifest, therefore, that when it appears that the question of jurisdiction is intermeshed with facts also relating to the merits of an action, judicial discretion is called for in the exercise of its timely determination of a challenged jurisdiction. In the case of *Zunamon* v. *Brown*, 418 F. 2d 883 (8th Cir. 1969), the U.S. Court of Appeals for the Eighth Circuit concisely places this judicial obligation in perspective:

> There is no one single solution to the question here presented. The scope of the pretrial jurisdictional inquiry must of necessity turn upon the specific pleadings and facts involved in each particular case. Yet in resolving the question of the appropriateness of jurisdiction as measured by the legal certainty of plaintiff's claim, all doubts should be resolved by the district court in favor of allowing a plenary trial rather than a peremptory trial under the guise of an evidentiary jurisdictional hearing. (Id. at 886.)

A similar expression of the general rule is found in the case of *McBeath* v. *Inter-American Citizens for Decency Committee*, 374 F. 2d 359 (5th Cir. 1967):

> Undoubtedly, under rule 12(d) of the Federal Rules of Civil Procedure a court may determine the prerequisites to jurisdiction in advance of a trial on the merits. However, where the factual and jurisdictional issues are completely intermeshed jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other. [Cases cited.] (Id. at 362–63.)

The defendant's motion challenging the lack of jurisdiction of this court over the subject matter of the within action properly cannot be determined from the pleadings nor the record presently before this court. On the contrary, the offer of proof and/or compilation of evidentiary facts submitted by the plaintiff at the time of oral argument serve to indicate to the court that the evidentiary facts necessary to controvert the jurisdiction challenged by the defendant concurrently are necessary in the submission and ultimate determination of the within action on the merits.

This court indicates no opinion as to the sufficiency of the evidence which may be ultimately submitted by the plaintiff. Suffice it to say, that in the within proceeding this court would deem it an abuse of discretion and prejudicial to the plaintiff to require at this juncture what has been aptly termed a preemptory trial as to the subject matter of jurisdiction challenged by the defendant.

Accordingly, the determination of defendant's motion to dismiss the within action for lack of jurisdiction of the subject matter will be deferred until the trial of the within action on the merits.

Pursuant to rule 4.7(a)(5) of this court, the defendant is granted a period of 30 days from and after the entry of this memorandum opinion to interpose an answer to plaintiff's complaint.

(C.R.D. 80–6)

SPRAGUE ELECTRIC COMPANY, PLAINTIFF, *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST), DEFENDANT

Memorandum and Order on Plaintiff's Motion for Rehearing

Court No. 77–9–03056

[Motion granted in part.]

(Dated May 23, 1980)

Frederick L. Ikenson, Esq., for the plaintiff.

Alice Daniel, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *Sidney N. Weiss*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge: Pursuant to rules 12.1 and 4.12 of this court, plaintiff has moved for a rehearing and reconsideration of certain aspects of the decision entered in this case on March 27, 1980 (C.R.D. 80–3).

Briefly, the background of this litigation is as follows: Plaintiff, an American manufacturer of tantalum electrolytic fixed capacitors, has brought this action under 19 U.S.C. 1516(c) (1976) challenging the negative injury determination of the U.S. International Trade Commission (Commission) in investigation No. AA1921–159 (41 F.R. 47604 (1976)), under the Antidumping Act of 1921, as amended (19 U.S.C. 160, et seq. (1970)). That investigation involved tantalum electrolytic fixed capacitors imported from Japan which the Department of the Treasury (Treasury) had determined were being or were likely to be sold in the United States at less than fair value (LTFV) within the meaning of the Antidumping Act, as amended.

Plaintiff contests the Commission's negative injury determination on several grounds, and the parties filed cross-motions for summary judgment contending that there is no genuine issue as to any material fact. In C.R.D. 80–3, I found, inter alia, that in making its negative determination, the Commission relied upon substantially erroneous import statistics which grossly understated the true value of Japanese tantalum capacitor imports. I agreed with the defendant's contention that if the Commission's original determination could not be sustained because of the incorrect import statistics, an appropriate remedy

would be to stay the proceedings in this court pending a new determination by the Commission in light of the correct statistical information. Accordingly, my order denied the cross-motions for summary judgment, and further ordered:

> 2. Proceedings in the instant case shall be stayed pending a reconsideration by the Commission of its original determination in investigation No. AA1921–159 and the taking of a new vote on the question of whether, in light of the correct import statistics for tantalum electrolytic fixed capacitors from Japan, sales of such merchandise at LTFV were injuring or were likely to injure an industry in the United States within the meaning of the Antidumping Act of 1921, as amended; and the Commission may conduct any further proceedings which it deems appropriate, but consistent with this order;
>
> 3. The Commission shall, through counsel for defendant, submit to the court within 90 days from the date of entry of this order (on or before June 25, 1980) its new determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefor, on all material issues of fact or law presented, including the materiality of the corrected import statistics on the Commission's new determination.

In support of its motion for rehearing, plaintiff urges that in making its new determination, the Commission "should be instructed to include in its deliberations the consideration of Nippon Electric Co.'s plans to increase productive capacity for, and exportation to the United States of, epoxy dipped tantalum electrolytic fixed capacitors" (memorandum, at 5).

In C.R.D. 80–3, I made reference to footnote 3 of the Commission majority's statement of reasons (41 F.R. 47605), and agreed with the approach of Commissioner Moore and Commissioner (now Chairman) Bedell in their finding of no likelihood of injury. As stated in footnote 3, Commissioners Moore and Bedell believed that "since no LTFV margins were found in NEC [Nippon Electric Co.] sales of epoxy dipped capacitors, * * * NEC's anticipated increase in exports of such capacitors to the United States should not be used as a basis for a finding of likelihood of injury." Nevertheless, as also pointed out in C.R.D. 80–3, in its statement of reasons the Commission majority found there was no likelihood of injury as a result of the LTFV imports, notwithstanding a planned expansion of Japanese capacity to produce tantalum capacitors in 1976 and 1977, and an anticipated increase in 1977 exports by one Japanese producer.

Upon further review of the issue, I have determined that the Commission should additionally consider in its deliberations on remand, the effect of Nippon's plans to increase productive capacity for, and exportation to the United States, of epoxy dipped tantalum electrolytic fixed capacitors, as requested by plaintiff. I am persuaded to agree with this view by the cogent rationale of Commissioner Parker

in his statement of reasons for affirmative determination, in which he concludes that Treasury's decision not to sever or eliminate Nippon's "dipped" capacitors from the class or kind of tantalum capacitors embraced by its LTFV determination (see C.R.D. 80–3, footnote 6) is binding upon the Commission as a matter of law; and "that (the) Commission has no authority to refine or modify the class or kind of merchandise found to be, or likely to be, sold at LTFV". Therefore, with respect to plaintiff's request that the Commission "should be instructed to include in its deliberations the consideration of Nippon Electric Company's plans to increase productive capacity for, and exportation to the United States of, epoxy dipped tantalum electrolytic capacitors", the motion for rehearing is granted.

The only other issue raised by the present motion that warrants comment is whether, as contended by plaintiff, the decision in C.R.D. 80–3 constitutes the sustaining in part of plaintiff's cause of action within the purview of 19 U.S.C. 1516(g)(1976), and hence whether, pursuant to that statute, liquidation of entries of the subject merchandise should be suspended. I am unable to agree with plaintiff's contention.

In C.R.D. 80–3, plaintiff's motion for summary judgment was denied, and there was no motion for partial summary judgment. In staying the proceedings before the court pending reconsideration by the Commission of its original determination and the taking of a new vote, the court has not thereby sustained in part plaintiff's cause of action. In point of fact, originally plaintiff opposed the granting of a remand of the proceedings to the Commission. Finally, with regard to the merits, there has as yet, been no judicial decision in this case that an affirmative injury determination by the Commission was required as a matter of law. Significantly, C.R.D. 80–3 states: "If in light of the correct import statistics, the Commission can still demonstrate a rational basis for a negative determination, this court will be obliged to sustain such determination." For the foregoing reasons, it would be improper at this juncture to require the Customs Service to suspend the liquidation of entries of the subject merchandise under 19 U.S.C. 1516(g).

I have carefully considered plaintiff's other arguments in support of its motion for rehearing, and find them lacking in merit.

For the reasons expressed herein, it is hereby ordered:

1. That plaintiff's motion for rehearing is granted to the extent that the Commission is directed to consider in its deliberations on remand the effect of Nippon Electric Co.'s plans to increase productive capacity for, and exportation to the United States, of epoxy dipped tantalum electrolytic fixed capacitors.

2. That the decision in C.R.D. 80–3 is adhered to in all other respects, and the application is denied as to all other issues raised by plaintiff's motion for rehearing.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/1	Maletz, J. January 3, 1980	Shayne Knitwear, Inc.	75-7-01894	Item 772.30 12.5% (jackets) Item 382.78 25¢ per lb. + 32.5% (blouses and pants)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/2	Maletz, J. January 3, 1980	Shayne Knitwear, Inc.	75-7-01904	Item 382.58 37.5¢ per lb. + 20% (blouses, pants and dresses) Item 772.30 12.5% (jackets)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 2-, 3-piece suits; entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/3	Maletz, J. January 3, 1980	Shayne Knitwear, Inc.	76-1-00203	Item 772.30 12.5% (vests) Item 382.58 37.5¢ per lb. + 20% (blouses) Item 382.78 25¢ per lb. + 32.5% (pants)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/4	Maletz, J. January 3, 1980	Shayne Knitwear, Inc.	76-9-02170	Item 791.75 6% (jackets) Item 382.78 25¢ per lb. + 32.5% (shirts) Item 382.58 37.5¢ per lb. + 20% (pants)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is appraised value	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/5	Maletz, J. January 4, 1980	Shayne Knitwear, Inc.	75-9-02421, etc.	Item 382.54 or 382.58 37.5¢ per lb. + 30%; or 37.5¢ per lb. + 20% (pants, blouses and dresses) Item 772.30 12.5% (jackets and skirts)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 2-, 3-piece suits; entireties

P80/6	Maletz, J. January 4, 1980	Shayne Knitwear, Inc.	77-1-00111	Item 772.30 12.5% (jackets and pants) Item 382.58 37.5¢ per lb. + 20% (vests) Item 382.81 25¢ per lb. + 27.5% (shirts)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies sets and suits; entireties
P80/7	Maletz, J. January 4, 1980	Shayne Knitwear, Inc.	77-6-00971	Item 772.30 12.5% (jackets) Item 382.58 37.5¢ per lb. + 20% (pullovers)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies sets; entireties
P80/8	Maletz, J. January 4, 1980	Shayne Knitwear, Inc.	77-7-01353	Item 772.30 12.5% (jackets, skirts, vests and pants) Item 382.58 or 382.54 37.5¢ per lb. + 20%; or 37.5¢ per lb. + 30% (pullovers)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies sets; entireties
P80/9	Maletz, J. January 4, 1980	Shayne Knitwear, Inc.	77-7-01354, etc.	Item 772.30 12.5% (skirts) Item 382.81 25¢ per lb. + 27.5% (blouses and scarves)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies sets; entireties

330-630 O - 81 - 18

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/10	Re, C. J. January 7, 1980	Asea, Inc.	79-4-00007	Item 685.90 8.5% upon full value of articles	Items 685.90/ 806.20 8.5% upon value of repairs only; value of repairs is $1,800	Agreed statement of facts	New York American goods returned; detector cards
P80/11	Re, C. J. January 7, 1980	John A. Knowles & Sons, a/c Great House, Inc.	79-3-00447	Item 727.30 8.5% Item 727.35 5%	Duty free under GSP	Agreed statement of facts	Miami Merchandise classified as furniture and parts thereof; product of eligible beneficiary country
P80/12	Re, C. J. January 7, 1980	Maple Leaf Fish Co.	76-11-02553	Item 113.25 15%	Item 113.20 10%	Agreed statement of facts	Detroit Fish products; not in oil; blanched and quick frozen
P80/13	Ford, J. January 7, 1980	John V. Carr & Son, Inc.	79-4-00619	Items 807.00/ 692.35 5.5%	Item 692.30 Free of duty	Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183)	Buffalo Log skidders imported from Canada, incorporating certain parts of U.S. manufacture assembled in Canada
P80/14	Watson, J. January 7, 1980	The Newman Import Co., dba The Newman Co.	77-6-00923	Item 389.60 25¢ per lb.+ 15%	Item A735.20 Free of duty	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tent flies which are parts of backpacking tents

P80/15	Maletz, J. January 7, 1980	Shayne Knitwear, Inc.	78–1–00106	Item 382.58 37.5¢ per lb.+ 20% (blouses, pullovers and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/16	Ford, J. January 14, 1980	Hawker Siddeley Canada, Ltd., et al.	76–6–01369, etc.	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Champlain-Rouses Point (Ogdensburg) Skidder tractors
P80/17	Maletz, J. January 14, 1980	Nadel & Sons Toy Corp.	78–4–00597	Item 737.90 17.5%	Item 734.20 5.5%	Mego Corp. v. U.S. (C.A. D. 1137)	New York "Pin ball game" or "slot machine game"
P80/18	Re, C. J. January 22, 1980	Verona Dyestuff (Div. of Mobay Chemical Corp.)	76–10–02307	Item 640.30 5% (drums) Item 406.50 20% (chemicals)	Sec. 557, Tariff Act of 1930, as amended Free of duty	Agreed statement of facts	New York Merchandise (drums of dyes and stains) withdrawn from warehouse on 6–27–73, 5–7–73, 11–30–72, 11–29–73 (entered 6–7–72, liquidated 6–6–75) for export to Germany in accordance with sec. 557, *supra*, and reexported to Germany at time of withdrawal
P80/19	Maletz, J. January 22, 1980	Carmichael International Service	76–5–01051	Item 359.50 25¢ per lb. + 30%	Item 346.60 15¢ per lb. + 25%	Agreed statement of facts	Los Angeles Rayon patchwork velvet; pile fabric of man-made fiber

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/20	Maletz, J. January 30, 1980	J. Gerber & Co., Inc.	75-5-01097	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	New York Music boxes
P80/21	Maletz, J. January 30, 1980	J. Kinderman & Sons	74-12-03518	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Philadelphia Music boxes
P80/22	Maletz, J. January 30, 1980	Shayne Knitwear, Inc.	77-7-01352	Item 382.58 37.5¢ per lb. + 20% (blouses and pants) Item 791.75 6% (vests)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece sets; entireties
P80/23	Maletz, J. January 31, 1980	Shayne Knitwear, Inc.	76-3-00702	Item 382.78 25¢ per lb. + 32.5% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties

				price			
P80/24	Rao, J. February 8, 1980	Phono Sonic Radio Corp.	78-8-01461	Item 678.50 5%	Item 678.50 Free of duty under GSP, by virtue of Ex. Order No. 11906 of 2/27/76	Agreed statement of facts	New York AM/FM/MPX with 8-track tape player chassis; product of eligible beneficiary country
P80/25	Ford, J. February 11, 1980	International Importers, Inc.	67/62025	Item 684.70 15%	Item 685.22 12.5%	Judgment on the pleadings	Chicago Radio earphones, not headphones
P80/26	Ford, J. February 11, 1980	Nomura (America) Corp.	65/18040	Par. 353 15%	Par. 353 13.75%	Judgment on the pleadings	New York Earphones having an essential electrical feature
P80/27	Ford, J. February 11, 1980	RCA Corporation	72-12-02543, etc.	Item 684.70 10% or 9%	Item 685.25 8.5% or 7%	Judgment on the pleadings	Los Angeles-Long Beach Radio earphones, not headphones
P80/28	Ford, J. February 11, 1980	Karl Schroff & Assoc., Inc.	67/31968	Item 684.70 15%	Item 685.22 12.5%	Judgment on the pleadings	San Francisco Radio earphones, not headphones
P80/29	Maletz, J. February 13, 1980	Mim Lador, Inc.	78-10-01859	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	New York Music boxes
P80/30	Rao, J. February 19, 1980	International Paint Co., Inc.	73-2-00595	Item 409.00 4¢ per lb. + 27%	Item 405.15 2¢ per lb. + 15%	Agreed statement of facts	Newark (New York) Arsenical paste for paint containing phenarsazine chloride, a benzenoid pesticide

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/31	Rao, J. February 19, 1980	Roger Gimbel Accessories	78-9-01650	Item 706.24 20%	Item 706.23 6.5%	Agreed statement of facts	Portland, Oreg. Linen bags
P80/32	Maletz, J. February 20, 1980	Dan Dee Imports, Inc.	79-5-00898	Item 737.20 17.5% (items marked "A" and "B")	Item 725.50 8% (items marked "A") Item A725.50 Free of duty under GSP, Trade Act of 1974 (items marked "B")	Amico, Inc. v. U.S. (C.A.D. 1214) (items "A" and "B")	New York Music boxes (items marked "A"); music boxes with revolving figurines, figures with musical movement, etc. (items marked "B")
P80/33	Ford, J. February 25, 1980	Dairyland Food Laboratories, Inc.	76-6-01534, etc.	Item 437.49 5%	Item 437.46 Free of duty Protests 3701-5-000311 and 3701-5-000330 untimely; claims dismissed	Novo Enzyme Corporation v. U.S. (C.D. 4806)	Milwaukee Rennet or microbial rennet, a microbial milk-clotting enzyme
P80/34	Ford, J. February 25, 1980	Dairyland Food Laboratories, Inc.	79-2-00313	Item 437.49 5%	Item 437.46 Free of duty	Novo Enzyme Corporation v. U.S. (C.D. 4806)	Milwaukee Rennet or microbial rennet, a microbial milk-clotting enzyme

P80/35	Ford, J. February 25, 1980	Dairyland Food Laboratories, Inc.	79-8-01297	Item 437.49 5%	Item 437.46 Free of duty	Novo Enzyme Corporation v. U.S. (C.D. 4806)	Milwaukee Rennet or microbial rennet, a microbial milk-clotting enzyme
P80/36	Ford, J. February 25, 1980	Mersco Wholesale Co., Inc.	73-9-02560, etc.	Item 653.37 9.5%	Item 653.35 5% Dutiable on basis of export value; said value is represented by exporter's invoice unit prices, less any included nondutiable charges, net, pkd.	U.S. v. Morris Friedman & Co. (C.A.D. 1156) C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Brass candlesticks
P80/37	Ford, J. February 25, 1980	Novo Enzyme Corporation	77-2-00234, etc.	Item 437.49 5%	Item 437.46 Free of duty	Novo Enzyme Corporation v. U.S. (C.D. 4806)	New York Rennet
P80/38	Ford, J. February 25, 1980	Novo Enzyme Corporation et al.	77-9-02962, etc.	Item 437.49 5%	Item 437.46 Free of duty	Novo Enzyme Corporation v. U.S. (C.D. 4806)	New York Rennet
P80/39	Ford, J. March 4, 1980	Novo Enzyme Corporation et al.	77-10-04368, etc.	Item 437.49 5%	Item 437.46 Free of duty	Novo Enzyme Corporation v. U.S. (C.D. 4806)	New York Rennet

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/40	Maletz, J. March 4, 1980	Shayne Knitwear, Inc.	77-9-03784	Item 382.58 37.5¢ per lb. + 20% (jackets, blouses and pants)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/41	Richardson, J. March 25, 1980	Shigma, Incorporated	78-7-01291	Item 720.90 27.5%	Item 685.90 8.5%	Agreed statement of facts	San Francisco Silicon interconnectors; electrical apparatus
R80/42	Richardson, J. March 25, 1980	Swift Instruments, Inc.	72-6-01268, etc.	Item 708.80 30% or 27%	Item 204.50 2¢ per lb. + 5%; or 2¢ per lb. + 4.5%	Swift Instruments, Inc. v. U.S. (C.D. 4804)	San Francisco Wooden boxes
P80/43	Boe, J. March 25, 1980	Enerco, Inc.	76-3-00594, etc.	Item 475.05 0.125¢ per gal. Item 475.10 0.25¢ per gal.	Not subject to duty under TSUS because it was never imported into U.S.	Hawaiian Independent Refinery v. U.S. (C.D. 4777)	Honolulu Light and heavy gas oil, testing both over and under 25° A.P.I. gravity, manufactured in Foreign Trade Subzone 9A, Honolulu, from crude oil having the status of non-privileged foreign merchandise

P80/44	Richardson, J. March 26, 1980	Eurasian Automotive Products	77-8-01377	Item 705.50 25%	Item 735.05 7.5%	Agreed statement of facts	San Francisco Gloves used in sport of motorcross
P80/45	Maletz, J. March 26, 1980	Nadel Trading Corp.	77-10-04199, etc.	Item 737.95 17.5%	Item 734.20 Free of duty pursuant to GSP by virtue of Ex. Order No. 11888 of 11/24/75	Mego Corp. v. U.S. (C.A.D. 1137)	New York Pin ball games; product of eligible beneficiary country
P80/46	Newman, J. March 28, 1980	S.G.B. Epic Co.	71-6-00310	Item 657.20 15% or 13%	Item 652.98 11% or 9.5%	S.G.B. Steel Scaffolding & Shoring Co., Inc. v. U.S. (C.D. 480[illegible]	New York Shore frame systems and parts
P80/47	Ford, J. March 31, 1980	Camel Manufacturing Co.	78-3-00554, etc.	Item 338.30 13¢ per lb. + 22.5%	Item 355.82 12.5¢ per lb. 15%	H. Rosenthal Co. v. U.S. (C.D. 4769, aff'd C.A.D. 1236)	Los Angeles Coated nylon taffeta
P80/48	Richardson, J. March 31, 1980	Sortex Co. of North America	74-5-01128, etc.	Item 712.49 10%	Item 666.25 5.5%	Sortex Company of North America, Inc., v. U.S. (C.D. 4746, aff'd C.A.D. 1221)	Detroit Electronic color sorting machines and parts
P80/49	Maletz, J. March 31, 1980	Phone Mate, Inc.	78-8-01451, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles Electronic TV games
P80/50	Richardson, J. March 31, 1980	WMF of America, Inc.	76-1-00031	Item 653.37 9.5%	Item 653.35 5%	Judgment on the pleadings U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks
P80/51	Maletz, J. March 31, 1980	Nadel Trading Corp.	79-10-01502	Item 737.95 17.5%	Item 734.20 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	New York Pin ball games

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/52	Watson, J. March 31, 1980	Mobay Chemical Corp.	77-12-04887	Item 405.25 9%+1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	Boston Desmocoll 176; hydroxylated polyurethane products
P80/53	Watson, J. March 31, 1980	World Famous Sales Co. et al.	75-9-02437, etc.	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S (C.D. 4648)	Chicago Nylon backpacking tents
P80/54	Ford, J. April 7, 1980	Camp Ways, Inc.	77-6-00899	Item 380.84 25¢ per lb. + 27.5%	Item 376.56 16.5%	H. Rosenthal Co. v. U.S. (C.D. 4769, aff'd C.A.D. 1236)	Los Angeles Ponchos of man-made fibers
P80/55	Richardson, J. Apri 7, 1980	Kombi Ltd.	79-8-01347	Item 734.99 9%	Item A734.99 Free of duty pursuant to GSP by virtue of Ex. Order No. 11888 of 11/24/75	Agreed statement of facts	Newark (New York) Ski gloves, etc.; products of eligible beneficiary country
P80/56	Richardson, J. April 10, 1980	Amico, Inc.	78-8-01527	Item 737.20 17.5%	Item 688.40 5.5%	Agreed statement of facts	Philadelphia "Sexy Doll Radios"; human figurine incorporating a radio as an integral part

P80/57	Watson, J. April 10, 1980	S. S. Kresge Co.	77-12-04952	Item 389.60 or 389.62 25¢ per lb. plus 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Longview (Portland, Oreg.) Tents
P80/58	Maletz, J. April 16, 1980	Shayne Knitwear, Inc.	77-5-00857	Item 382.78 25¢ per lb. + 32.5% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/59	Newman, J. April 16, 1980	Uniroyal, Inc., c/o A. N. Deringer, Inc.	78-1-00009	Item 657.20 9.5%	Item 772.65 4%	Summary judgment	Champlain-Rouses Point (Ogdensburg) Hose of rubber with attached fittings
P80/60	Richardson, J. April 22, 1980	Alltransport, Inc.	77-8-01938	Item 708.89 22.5%	Item 708.80 15%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767)	New York Microscopy phototubes
P80/61	Richardson, J. April 22, 1980	Alltransport, Inc.	77-11-04673	Item 708.89 22.5%	Item 708.80 15%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767)	New York Microscopy phototubes
P80/62	Richardson, J. April 22, 1980	Wild Heerbrugg Instruments, Inc.	77-11-04676	Item 708.89 22.5%	Item 708.80 15%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767	New York Microscopy phototubes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/63	Re, C.J. April 30, 1980	Kombi Ltd.	79-1-00074	Item 705.35 15%	Item 734.97 Free of duty under GSP, by virtue of Ex. Order No. 11888 of 11/24/75	Stonewall Trading Co. v. U.S. (C.D. 4023)	New York Ski gloves, skimitts, or ski mittens; product of eligible beneficiary country
P80/64	Re, C.J. April 30, 1980	Kombi International	79-8-01210	Item 705.35 15%	Item 734.97 Free of duty under GSP, by virtue of Ex. Order No. 11888 of 11/24/75	Stonewall Trading Co. v. U.S. (C.D. 4023)	New York Ski gloves, skimitts, or ski mittens; product of eligible beneficiary country
P80/65	Watson, J. April 30, 1980	Entex Industries, Inc.	78-8-01480, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. game player machines
P80/66	Maletz, J. April 30, 1980	R. W. Smith & Co., Inc., a/c Poco Graphite, Inc. Poco Graphite, Inc.	76-7-01756, etc.	Item 517.91 7.5%	Item 517.11 2.5%	R. W. Smith & Co., Inc., a/c Poco Graphite, Inc. v. U.S. (Prot. abs. P79/97)	Houston Artificial graphite (grades A-200, A-250, FE-250 and A-490)

	April 30, 1980	a/c Poco Graphite, Inc. Poco Graphite, Inc.	etc.	15%		U.S. (Prot. abs. P79/97)	A-200, A-250, FE-250 and A-490)

P80/67	Re, C.J. May 9, 1980	Olympia Sports Co., Inc.	77-5-00744, etc.	Item 705.35 15%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	New York Leather gloves, style Nos. 600, 604, 650
P80/68	Richardson, J. May 9, 1980	Flextrac Nodwell, Ltd., a/c Border Brokerage Co., Inc., et al.	77-4-00630	Item 358.06 10%, 14%, 12.5% or 11%	Item 692.27 8.5%, 7.5%, 6.5% or 5.5%	Border Brokerage Company, Inc. v. U.S. (C.D. 4756)	Blaine (Seattle) Track tread material for motor vehicles
P80/69	Watson, J. May 9, 1980	Ruben's Originals	78-2-00311	Item 737.40 17.5%	Item 773.10 8.5%	Judgment on the pleadings	Los Angeles Plastic animals
P80/70	Watson, J. May 9, 1980	Ruben's Originals	78-2-00229	Item 737.40 17.5%	Item 773.10 8.5%	Judgment on the pleadings	Los Angeles Plastic animals
P80/71	Ford, J. May 14, 1980	Benito Fernandez Pantoja, as Former Director and President de Montezuma of Florica, Inc., a Dissolved Florida Corporation	79-5-00747	Item 167.10 $1.17 per gal. and Int. Rev. taxes at $3.40 per gal. on 1100 cartons of wine	Item 167.10 $1.17 per gal. and Int. Rev. taxes at $3.40 per gal. for only 427 cartons actually received	Agreed statement of facts	Miami Shortage; sparkling wine
P80/72	Landis, J. May 14, 1980	Nadel Trading Corp.	78-10-01847	Item 737.20 17.5%	Item 688.40 5.5%	Agreed statement of facts	New York Sexy Susie Radio; electrical article

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
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P80/73	Richardson, J. May 27, 1980	Fairchild Semiconductor, A Division of Fairchild Camera and Instrument Corporation	71-11-01794	Item 687.60 11% or 10% on full value of imported merchandise Item 687.60/807.00 11% or 10% on full value of imported merchandise, less cost or value of U.S. products	Item 687.60/807.00 Cost or value of U.S. products deductible from value of imported merchandise; correct amount of duty as to each entry shown on exhibit 2 attached to decision and judgment as "Revised Duty"	U.S. v. Texas Instruments Incorporated (C.A.D. 1178) General Instrument Corporation v. U.S. (C.A.D. 1062)	San Francisco American goods returned; semiconductors, transistors and/or integrated circuits containing U.S. fabricated components (silicon dice and gold wire)

P80/74	Richardson, J. May 27, 1980	Fairchild Semiconductor, A Division of Fairchild Camera and Instrument Corporation	72-10-02089	Item 687.60 11%, 10% or 8.5% on full value of imported merchandise Items 687.60/807.00 11%, 10% or 8.5% on full value of imported merchandise, less cost or value of U.S. products	Item 687.60/807.00 Cost or value of U.S. products deductible from value of imported merchandise; correct amount of duty as to each entry shown on exhibit 2 attached to decision and judgment as "Revised Duty"	U.S. v. Texas Instruments Incorporated (C.A.D. 1178) General Instrument Corporation v. U.S. (C.A.D. 1062)	San Francisco American goods returned; semiconductors, transistors and/or integrated circuits containing U.S. fabricated components (silicon dice and gold wire)

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P80/75	Richardson, J. May 27, 1980	Fairchild Semiconductor, A Division of Fairchild Camera and Instrument Corporation	73-10-02754	Item 687.60 10%, 8.5% or 7% on full value of imported merchandise Items 687.60/807.00 10%, 8.5% or 7% on full value of imported merchandise, less cost or value of U.S. products	Items 687.60/807.00 Cost or value of U.S. products deductible from value of imported merchandise; correct amount of duty as to each entry shown on exhibit 2 attached to decision and judgment as "Revised Duty"	U.S. v. Texas Instruments Incorporated (C.A.D. 1178) General Instrument Corporation v. U.S. (C.A.D. 1062)	San Francisco American goods returned; semiconductors, transistors and/or integrated circuits containing U.S. fabricated components (silicon dice and gold wire)
P80/76	Maletz, J. May 27, 1980	Mim Lador, Inc.	75-12-03300, etc.	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	New York Wooden musical figurines, musical merry-go-round, musical soldiers, dancing figurines, music boxes, etc.
P80/77	Newman, J. May 27, 1980	Atlas Rand Keystone, d/o Berkey Photo, Inc., et al.	73-9-02670	Item 722.34 10%	Item 722.75 4.5%	Agreed statement of facts	New York Photographic light meters and photographic meter assemblies

		et al.					assemblies
P80/78	Newman, J. May 27, 1980	S.G.B. Steel Scaffolding and Shoring Co., Inc.	71-8-00758	Item 657.20 15%, 13% or 11%	Item 652.98 11% or 9.5%	S.G.B. Steel Scaffolding & Shoring Co., Inc. v. U.S. (C.D. 4802)	New York Shore frame systems and parts
P80/79	Landis, J. May 29, 1980	Frankel Company, Inc.	78-4-00556	Item 629.20 18%	Item 629.15/ 911.1220 Duty free	Agreed statement of facts	Detroit Titanium scrap
P80/80	Landis, J. May 29, 1980	Minnesota Mining & Manufacturing Company	78-2-03231, etc.	Item 676.52 5.5%	Item 676.30 5%	Agreed statement of facts	Seattle "Toshiba electrostatic copying machines"
P80/81	Landis, J. May 29, 1980	F. W. Woolworth	79-8-01296	Item 389.62 15% plus 25¢ per lb.	Item A734.77 Free of duty pursuant to General Headnote 3(c) of TSUS, authorized by title V of Trade Act of 1974, and Ex. Order No. 11888 of 11/26/75	Agreed statement of facts	New Orleans Golf head covers produced within Korea
P80/82	Landis, J. June 6, 1980	H. E. Lauffer Co., Inc.	73-9-02702, etc.	Item 533.65 10¢ per doz. pcs. + 55% Item 533.66 10¢ per doz. pcs. + 30%	Item 533.28 5¢ per doz. pcs. + 10.5%	Agreed statement of facts	New York Ceramicware (stoneware and earthenware)
P80/83	Landis, J. June 6, 1980	Rhodia, Inc.	78-1-00119	Items 423.00/423.96 5%	Item 519.37 0.4¢ per lb.	Judgment on the pleadings	New York Cerox

330-630 O - 81 - 19

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/84	Landis, J. June 6, 1980	Rhodia, Inc.	78-11-01992	Items 423.00/423.96 5%	Item 519.37 0.4¢ per lb.	Judgment on the pleadings	New York Cerox
P80/85	Landis, J. June 6, 1980	Rhodia, Inc.	78-12-02114	Items 423.00/423.96 5%	Item 519.37 0.4¢ per lb.	Judgment on the pleadings	New York Cerox
P80/86	Landis, J. June 6, 1980	Rhodia, Inc.	79-3-00407	Items 423.00/423.96 5%	Item 519.37 0.4¢ per lb.	Judgment on the pleadings	New York Cerox
P80/87	Landis, J. June 6, 1980	Rhodia, Inc.	79-3-00539	Items 423.00/423.96 5%	Item 519.37 0.4¢ per lb.	Judgment on the pleadings	New York Cerox
P80/88	Watson, J. June 10, 1980	Lloyd's Electronics Int'l	79-5-00858, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics v. U.S. (C.D. 4704)	New York; Los Angeles T.V. game player machines
P80/89	Maletz, J. June 10, 1980	Silvestri Art Mfg. Co.	77-4-00558	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Chicago Music boxes
P80/90	Maletz, J. June 10, 1980	Spiegel, Inc.	77-3-00421	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Chicago Music boxes
P80/91	Newman, J. June 10, 1980	S.G.B. Epic Co., Inc., *et al.*	73-6-01354, etc.	Item 657.20 15%, 13%, 11% or 9.5%	Item 652.98 11% or 9.5%	S.G.B. Steel Scaffolding & Shoring Co., Inc. v. U.S. (C.D. 4802)	New York Shore frame systems and parts thereof

P80/92	Maletz, J. June 19, 1980	Shayne Knitwear, Inc.	75-7-01895	Item 382.78 25¢ per lb. + 32.5% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/93	Ford, J. June 19, 1980	Camel Manufacturing Co.	77-12-04903	Item 338.30 13¢ per lb. + 22.5%	Item 355.82 12.5¢ per lb. + 15%	H. Rosenthal Co. v. U.S. (C.D. 4769, aff'd C.A.D. 1236)	San Juan Coated nylon taffeta
P80/94	Ford, J. June 19, 1980	Camel Manufacturing Co.	79-4-00717	Item 338.30 13¢ per lb. + 22.5%	Item 355.82 12.5¢ per lb. + 15%	H. Rosenthal Co. v. U.S. (C.D. 4769, aff'd C.A.D. 1236)	Charleston, S.C. Coated nylon taffeta
P80/95	Ford, J. June 19, 1980	H. Rosenthal Co.	77-1-00018	Item 380.84 25¢ per lb. + 27.5%	Item 376.56 16.5%	H. Rosenthal Co. v. U.S. (C.D. 4769, aff'd C.A.D. 1236)	Minneapolis Men's and boy's parkas
P80/96	Maletz, J. June 19, 1980	Adolco Trading Co., Inc.	78-6-01167	Item 389.60 25¢ per lb. + 15%	Item 386.08 25%	Agreed statement of facts	New York Net shopping bags
P80/97	Maletz, J. June 19, 1980	John V. Carr & Son, Inc.; Paccar Inc., d/b/a Dyncraft Company	77-11-04638	Item 772.65 4%	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Port Huron (Detroit) Various types of hose; Canadian articles and original motor-vehicle equipment

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/98	Maletz, J. June 19, 1980	K Mart Corporation	79-5-00817	Item 654.20 8.5%	Item A654.20 Free of duty pursuant to General Headnote 3(c), TSUS; title V, Trade Act of 1974, and Ex. Order 11888 of 11-26-75	Agreed statement of facts	Newark (New York) Musical jewelry boxes produced within Taiwan
P80/99	Maletz, J. June 19, 1980	S. S. Kresge Co.	78-3-00514	Item 737.95 17.5%	Item A737.15 Free of duty pursuant to General Headnote 3(c), TSUS; title V, Trade Act of 1974, and Ex. Order 11888 of 11-26-75	Agreed statement of facts	Longview (Portland, Oreg.) Models of trucks, tractors, cars, etc., to a scale larger than 1 to 85, produced within Hong Kong
P80/100	Maletz, J. June 19, 1980	Pharmacia Inc.	79-12-01786	Item 711.88 or 712.49 11% or 10%	Item 678.50 5%	Agreed statement of facts	New York Gradient mixers (mixing devices for liquids)
P80/101	Re, C.J. June 20, 1980	Bar-Zel Expediters, a/c Grandoe Corp.	77-9-03067	Item 705.35 15%	Item 734.97 9%	Stonewall Trading Co. v. U.S. (C.D. 4023)	New York Ski gloves, ski mitts, or ski mittens

P80/102	Ford, J. June 20, 1980	A. Sajet, Inc., et al.	70/40247, etc.	Item 653.40 (pre-1968) 19% Item 653.37 17% and 15% Item 653.39 19%	Item 653.35 10.5%, 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks, etc.
P80/103	Richardson, J. June 20, 1980	Alltransport, Inc.	77-12-04864	Item 708.80 22.5%	Item 708.80 15%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767)	New York Microscopy phototubes
P80/104	Richardson, J. June 20, 1980	Nippon Kogaku (USA), Inc.	68/64122, etc.	Item 708.80 45%	Item 708.80 30%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767)	New York Microflex models EFM and FM-B with universal eyepiece adapter
P80/105	Maletz, J. June 20, 1980	W. R. Filbin & Company, Inc.	79-11-01729	Item 642.47 60%	Item 642.80 45%	Judgment on the pleadings	Buffalo Galvanized hex wire netting
P80/106	Maletz, J. June 20, 1980	Mitsui & Co. (USA), Inc.	78-2-00327	Item 661.90 5.5%	Item 800.00 Free of duty	Judgment on the pleadings	Los Angeles American goods returned; filtering element for a bag filter of teflon cloth
P80/107	Maletz, J. June 20, 1980	Olympia Sports Co., Inc.	79-9-01481	Item 705.85 15%	Item A735.05 Free of duty under GSP	Agreed statement of facts	New York Men's cowhide ski mittens

ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/1	Re, C. J. January 3, 1980	American Express Company, a/c Bus & Truck Supply Company, et al.	R66/2278, etc.	Constructed value	$19,273.20, plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses
R80/2	Re, C.J. January 7, 1980	Arriflex Corp. of America	76-2-00520	Export value	Invoice unit prices	Agreed statement of facts	New York Tape recorders and parts

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/3	Re, C.J. January 7, 1980	K Mart Corporation	79–4–00681	Export value	$0.99 per pair	Agreed statement of facts	Savannah "Style B Code No. 47–14–10" footwear (28,008 pairs)
R80/4	Newman, J. January 22, 1980	YKK Zipper (USA), Inc., et al.	73–7–01861	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R80/5	Newman, J. January 22, 1980	Yoshida International, Inc.	74–6–01440	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R80/6	Rao, J. February 8, 1980	YKK Zipper Co., Inc., Yoshida International, Inc.	77–10–04066	United States value	Equal to invoiced unit prices, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R80/7	Rao, J. February 8, 1980	Yoshida International, Inc.	76–5–01320	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74

R80/8	Ford, J. February 8, 1980	Mitsui & Co.	R68/17314	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R80/9	Rao, J. February 13, 1980	Imported Rug Associates, Ltd.	R62/11260, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/10	Rao, J. February 13, 1980	Imported Rug Associates, Ltd.	R65/5475, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/11	Rao, J. February 14, 1980	Manhattan Novelty Corp.	R59/1023, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/12	Rao, J. February 14, 1980	Selsi Co., Inc.	263158-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/13	Rao, J. February 14, 1980	Selsi Co., Inc.	289216-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/14	Rao, J. February 14, 1980	Selsi Co., Inc.	R58/14402, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/15	Rao, J. February 14, 1980	Selsi Co., Inc.	R58/26525, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/16	Rao, J. February 14, 1980	Selsi Co., Inc.	R59/5264, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/17	Rao, J. February 14, 1980	Selsi Co., Inc.	R61/6788, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

R80/18	Re, C. J. February 19, 1980	Reynolds Trading Company	73–8–02279, etc.	Export value	Invoice unit values	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Bicycle parts
R80/19	Rao, J. February 19, 1980	Inter-Maritime Fwdg. Co., Inc.	R59/3108, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Ear sets
R80/20	Rao, J. February 19, 1980	Manhattan Novelty Corp.	R58/6521, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/21	Rao, J. February 19, 1980	Manhattan Novelty Corp.	R60/9731	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco-Oakland Binoculars
R80/22	Rao, J. February 19, 1980	Manhattan Novelty Corp.	R61/5203, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/23	Re, C. J. February 20, 1980	Mersco Wholesale Co., Inc.	76–5–01069	Export value	U.S. $32.45, $28.65 and $28.40 per doz., pkd. (Style Nos. M–485, L–4059, L–4059M) (currency fluctuation additions improper)	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Knit wearing apparel

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/24	Rao, J. February 20, 1980	Charmilles Corp. of America	75-4-00881	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at fixed rate of exchange as shown on special customs invoice in entry documents (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/25	Rao, J. February 20, 1980	House of Adler, Inc.	78-7-01345	Export value	Invoiced unit value, and, where applicable, less air mail, assay, and insurance charges, net packed	Agreed statement of facts	Honolulu Loose diamonds
R80/26	Rao, J. February 20, 1980	Merit International Corp.	74-10-02770	Export value	Various f.o.b. invoice prices as shown in entry documents, net packed, without additions which were included in appraised values to reflect currency valuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Boston Tape players, stereo sets, speakers, etc.

R80/27	Rao, J. February 21, 1980	Manhattan Novelty Corp.	297068-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/28	Rao, J. February 21, 1980	Selsi Co., Inc.	278406-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/29	Re, C. J. February 25, 1980	Adorence Co. Inc.	77-4-00674, etc.	Export value	Various appraised values shown on entry papers less additions included in said appraised values to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	New York Ladies wearing apparel
R80/30	Rao, J. March 4, 1980	Yoshida International, Inc. YKK Zipper (USA), Inc., et al.	73-12-03363, etc.	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R80/31	Ford, J. March 4, 1980	C M Import & Export Corp.	R65/1864, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R80/32	Ford, J. March 5, 1980	C M Import & Export Corp.	R62/6180, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/33	Watson, J. March 5, 1980	Ciba Chemical and Dye Company	R66/8558, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement: less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R80/34	Watson, J. March 5, 1980	Geigy Chemical Corporation	R66/08206, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					penses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R80/35	Watson, J. March 5, 1980	Geigy Chemical Corporation	R66/19178, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/36	Rao, J. March 12, 1980	Imported Rug Associates, Ltd.	R58/10023, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Rugs
R 0/37	Rao, J. March 12, 1980	Imported Rug Associates, Ltd.	R64/3927, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/38	Rao, J. March 12, 1980	Imported Rug Associates, Ltd.	R64/4177, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/39	Rao, J. March 13, 1980	Imported Rug Associates, Ltd.	R63/986, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/40	Watson, J. March 13, 1980	Ciba Chemical and Dye Company	R66/18301	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dye-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					penses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R80/41	Watson, J. March 13, 1980	Ciba Chemical and Dye Company	R66/23888, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

330-630 O - 81 - 20

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/42	Watson, J. March 13, 1980	Ciba Chemical and Dye Company	R67/0114	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R80/43	Watson, J. March 13, 1980	Ciba Chemical and Dye Company	R69/11527 etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R80/44	Watson, J. March 13, 1980	Geigy Chemical Corporation	R66/16348, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/45	Watson, J. March 13, 1980	Geigy Chemical Corporation	R66/16980	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R80/46	Watson, J. March 13, 1980	Rohner Gehrig & Co., Inc.	R66/27833 etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R80/47	Watson, J. March 13, 1980	Rohner Gehrig & Co., Inc.	R66/28415	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/48	Rao, J. March 17, 1980	Imported Rug Associates, Ltd.	R63/5751, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/49	Rao, J. March 17, 1980	Stone & Downer Co.	R58/22615, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values, net packed	Agreed statement of facts	Boston Binoculars
R80/50	Rao, J. March 17, 1980	Strong Importers, Inc.	242663-A, etc.	Export value	Appraised values less 7.5%	Agreed statement of facts	New York Sewing machines
R80/51	Watson, J. March 17, 1980	Geigy Chemical Corporation	R65/24002, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1135)	New York Benzenoid dyestuffs

					determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R80/52	Watson, J. March 17, 1980	Rohner Gehrig & Co., Inc.	R66/19746	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R80/53	Rao, J. March 18, 1980	Brother International Corp.	R65/4303, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Consoles and sewing machine heads

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/54	Rao, J. March 18, 1980	Hayim & Co.	R59/7080, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/55	Rao, J. March 18, 1980	Imported Rug Associates, Ltd.	R66/1803, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/56	Rao, J. March 18, 1980	Imported Rug Associates, Ltd.	R67/2211, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/57	Rao, J. March 18, 1980	Imported Rug Associates, Ltd.	R67/15477, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/58	Rao, J. March 19, 1980	Brother International Corp.	R61/18710	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Sewing machine heads
R80/59	Rao, J. March 19, 1980	Brother International Corp.	R62/12990, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Philadelphia Sewing machines and wooden consoles
R80/60	Rao, J. March 19,	Mitsubishi Interna-	R62/2241,	Export value	Appraised unit values	Agreed statement of	

R80/60	Rao, J. March 19, 1980	Mitsubishi International Corp.	R62/2241, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Canned tuna
R80/61	Rao, J. March 19, 1980	Trans World Industries, Inc.	R62/2312, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Sewing machines
R80/62	Rao, J. March 19, 1980	Trans World Industries, Inc.	R65/23084, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Sewing machines
R80/63	Ford, J. March 19, 1980	C M Import & Export Corp.	R65/4951, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R80/64	Ford, J. March 19, 1980	C M Import & Export Corp.	R66/16864	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R80/65	Re, C.J. March 20, 1980	Holly Stores Inc.	76-8-01839, etc.	Export value	Appraised values shown on entry papers less those additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Wearing apparel, etc.
R80/66	Rao, J. March 20, 1980	Brother Int'l Corp.	R63/1222, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Sewing machine heads
R80/67	Rao, J. March 20, 1980	Consolidated Sewing Machine Corp.	R62/9577, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machine heads

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/68	Rao, J. March 20, 1980	Tanross Supply Co.	R58/1720, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/69	Rao, J. March 20, 1980	Trans World Industries, Inc.	R65/16050, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Sewing machines
R80/70	Ford, J. March 20, 1980	C M Import & Export Corp.	R65/2542	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R80/71	Re, C.J. March 25, 1980	Adorence Co. Inc.	74-4-01061	Export value	Appraised values shown on entry papers less those additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/72	Rao, J. March 25, 1980	Standard Glass Co., an Arizona corporation	76-2-00434	Foreign value	$2,035, net packed	Agreed statement of facts	Los Angeles Laminated sheet glass

	1980	poration					
R80/73	Rao, J. March 25, 1980	YKK Zipper Co. Inc. Yoshida International, Inc., et al.	75-10-02605, etc.	Constructed value	Equal to invoiced unit prices plus 8.5%, net packed	Agreed statement of facts	New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R80/74	Richardson, J. March 25, 1980	Merit International Corp.	75-2-00335	Constructed value	Invoice units of value, plus amounts for ocean freight from Japan to Canada, and freight charges to U.S., packed, as set forth in invoices, or in those instances where ocean freight and shipping charges are not set forth, at invoice units of value, plus 10%, packed	Agreed statement of facts	Boston Headphones, stereo tape player, etc.
R80/75	Richardson, J. March 25, 1980	Merit International Corp.	75-5-01216	Constructed value	Invoice unit value, plus amounts for ocean freight from Japan to Canada, and freight charges to U.S., packed, as set forth in invoices, or in those instances where ocean freight and shipping charges are not set forth, at invoice units of value, plus 10%, packed	Agreed statement of facts	Boston Tape players

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/76	Richardson, J. March 25, 1980	Merit International Corp.	75-7-01811	Constructed value	Invoice units of value, plus amounts for ocean freight from Japan to Canada, and freight charges to U.S., packed, as set forth in invoices, or in those instances where ocean freight and shipping charges are not set forth, at invoice units of value, plus 10%, packed	Agreed statement of facts	Boston Auto tape player, home stereo, and speakers
R80/77	Richardson, J. March 25, 1980	Merit International Corp.	75-12-03255	Constructed value	Invoice units of value, plus 10% packed	Agreed statement of facts	Boston Tape players
R80/78	Newman, J. March 25, 1980	Yoshida International, Inc. YKK Zipper Inc.	74-6-01552	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net packed Equal to invoiced unit prices, net packed	Agreed statement of facts	Los Angeles; New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R80/79	Boe, J. March 25, 1980	Federal Pacific Electric Co.	74-12-03476	Export value	Equal to invoice unit prices, net packed	Agreed statement of facts	Buffalo Switches, switchboard parts and relays
R80/80	Re, C.J. March 26, 1980	Allis-Chalmers Power Systems, Inc.	75-8-01916, etc.	Export value	Invoice unit prices, net packed	C.B.S. Imports Corp. (C.D. 4739)	Milwaukee Parts of turbine generators
R80/81	Rao, J.	Consolidated Sewing	R69/4794				

R80/81	Rao, J. March 26, 1980	Consolidated Sewing Machine Corp.	R60/4724, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machine heads
R80/82	Rao, J. March 26, 1980	Trans World Industries	R66/16518, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R80/83	Rao, J. March 26, 1980	Trans World Industries	R67/13437, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R80/84	Rao, J. March 26, 1980	Trans World Industries, Inc.	R68/5900, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R80/85	Richardson, J. March 26, 1980	Consolidated Sewing Machine Corp.	R65/16603, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles Sewing machines
R80/86	Richardson, J. March 26, 1980	J. C. Penney	R61/503, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Norfolk Tubing mats
R80/87	Richardson, J. March 26, 1980	J. C. Penney	R63/2951, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Portland, Oreg. Tubing mats

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/88	Richardson, J. March 26, 1980	J. C. Penney	R64/13948, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Tubing mats
R80/89	Richardson, J. March 26, 1980	J. C. Penney	R64/14156, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New Orleans Tubing mats
R80/90	Richardson, J. March 26, 1980	J. C. Penney	R64/15256, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Baltimore Tubing mats
R80/91	Richardson, J. March 26, 1980	J. C. Penney	R64/17382	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	San Diego Tubing mats
R80/92	Richardson, J. March 26, 1980	J. C. Penney	R65/179, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Wilmington, N.C. Tubing mats
R80/93	Richardson, J. March 26, 1980	J. C. Penney	R65/2707, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Wilmington, N.C. Hand hooked rugs
R80/94	Richardson, J.	J. C. Penney	R65/12016	Export value			

R80/94	Richardson, J. March 26, 1980	J. C. Penney	R65/12016, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Tubing mats
R80/95	Richardson, J. March 26, 1980	Trans World Shipping	R59/16102, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R80/96	Re, C.J. March 28, 1980	Adorence Co. Inc.	73-8-02226	Export value	Appraised values shown on entry papers less those additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/97	Re, C.J. March 28, 1980	Korvettes, Division of Arlen Realty & Development Corp.	72-12-02499, etc.	Export value	Appraised values shown on entry papers less those additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/98	Re, C.J. March 28, 1980	Korvettes, Division of Arlen Realty & Development Corp.	73-1-00296, etc.	Export value	Appraised values shown on entry papers less those additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/99	Re, C.J. March 28, 1980	Korvettes, Division of Arlen Realty Development Corp.	77-9-03904, etc.	Export value	Appraised values shown on entry papers less those additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/100	Richardson, J. March 28, 1980	J. E. Bernard & Co. Inc.	76-3-00780	Constructed value	Invoice units of value, plus amounts for ocean freight from Japan to Canada, and freight charges to U.S., packed, as set forth in invoices, or in those instances where ocean freight and shipping charges are not set forth, at invoice units of value, plus 10%, packed	Agreed statement of facts	Boston Auto tape players
R80/101	Re, C.J. March 31, 1980	Scope Imports, Inc.	75-8-02004, etc.	Export value	Appraised values shown on entry papers less those additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Houston Nylon snorkel coats, waterproof silver coat backing
R80/102	Richardson, J. April 7, 1980	Conti Rubber Products Inc.	76-12-02781, etc.	Foreign value	DM88.176, DM52.866, DM65.406, DM63.492, DM64.35	Agreed statement of facts	Los Angeles Various automotive tires
R80/103	Richardson, J.	Gebrig, Hoban &	R68/14826	United States			

	April 7, 1980	ucts Inc.	etc.		DM64.35		tires
R80/103	Richardson, J. April 7, 1980	Gehrig, Hoban & Co., Inc.	R68/14826	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at the rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/104	Boe, J. April 7, 1980	J. E. Bernard & Company, Inc.	R68/2607	Export value	Invoice value of 8FR 45,000, plus US $30,000 for license fee, net, packed	Agreed statement of facts	Chicago "One Special Camera (camera with two stands complete)"
R80/105	Richardson, J. April 10, 1980	Conti Rubber Products Inc.	76-5-01134, etc.	Foreign value	DM35.046; DM56.628; DM38.478; DM64.614; DM37.488; DM41.184	Agreed statement of facts	Boston Automotive tires
R80/106	Richardson, J. April 10, 1980	Frank P. Dow Co., Inc.	R69/1707, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	San Francisco Machine tools and accessories and parts thereof
R80/107	Re, C.J. April 15, 1980	CBS Imports Corp.	74-7-01733, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Various articles

330-630 O - 81 - 21

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/108	Re, C.J. April 15, 1980	Impecco Ltd.	74-4-01064, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/109	Re, C.J. April 15, 1980	Kenton Textile Co., Inc.	73-2-00345, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/110	Re, C.J. April 15, 1980	Irving W. Rice Co., Inc.	73-1-00056, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/111	Ford, J. April 15, 1980	B & K Instruments, Inc.	R67/8683, etc.	Export value	Invoice unit prices less, where applicable, the items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments
R80/112	Richardson, J. April 15, 1980	A. W. Fenton Co., Inc.	R65/4139, etc.	Export value	1,976.25, 2,906.25, 5,366.90, Danish Kroner, net packed, less cost of packing saved as indicated on invoice	The A. W. Fenton Co., Inc. v. U.S. (R.D. 11755)	Cleveland Instruments
R80/113	Ford, J.	B & K Instruments,	R69/13568,	Export value	Invoice unit prices less,		

					dicated on invoice		
R80/113	Ford, J. April 16, 1980	B & K Instruments, Inc.	R69/13568, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments
R80/114	Richardson, J. April 16, 1980	The A. W. Fenton Co., Inc.	R65/4144, etc.	Export value	Invoiced unit prices less, where applicable, a proportionate part of items specified on invoices as saved packing, as set forth on schedule B attached to decision and judgment	Agreed statement of facts	Cleveland Instruments
R80/115	Watson, J. April 16, 1980	United Silver & Cutlery Co.	R63/6796, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles Porcelainware platter saucers, plates, etc.
R80/116	Re, C.J. April 25, 1980	Baytex, Division of Baychem	74–9–02537	Export value	Invoice unit value ($0.6707 per pound), packed	C.B.S. Imports Corp. v. U.S. (C.D. 4730)	Charleston Perlon (all nylon) staple fiber, non crimp set
R80/117	Watson, J. April 25, 1980	Consolidated Sewing Machine Corp.	R60/3565, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles Sewing machines
R80/118	Watson, J. April 25, 1980	Consolidated Sewing Machine Corp.	R61/16565, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machines
R80/119	Watson, J. April 25, 1980	Consolidated Merch. Corp.	R64/14652, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Miami Sewing machines

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/120	Watson, J. April 25, 1980	J. C. Penney Co.	R60/17200, etc.	Export value	$13.208 ea. (radios with leather cases); 19¢ ea. (batteries); 50¢ ea. (earphone and cases)	Agreed statement of facts	Seattle Radios with leather cases; batteries; earphone and cases
R80/121	Watson, J. April 25, 1980	J. C. Penney	R60/22958	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Tubing mats
R80/122	Watson, J. April 25, 1980	J. C. Penney	R64/12818, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Baltimore Tubing mats
R80/123	Watson, J. April 25, 1980	J. C. Penney	R64/14502, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Houston Tubing mats
R80/124	Watson, J. April 25, 1980	J. C. Penney	R64/17900, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Boston Tubing mats
R80/125	Watson, J. April 25, 1980	Wheeler & Miller, a/c Fleetwood Industries	R59/8186, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraisad values	Agreed statement of facts	San Francisco Sewing machine heads

R80/126	Newman, J. April 25, 1980	Gehrig, Hoban & Co., Inc.	R68/18085, etc.	United States value	Determined by adding f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between the claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts
R80/127	Re, C.J. April 29, 1980	CBS Imports, Inc.	73-4-01061, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R80/128	Re, C.J. April 29, 1980	CBS Imports Corp.	73-7-02107, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R80/129	Re, C.J. April 29, 1980	CBS Imports Corp.	77-3-00517, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R80/130	Re, C.J. April 29, 1980	Korvettes, Division of Arlen Realty & Development Corp.	73-7-01685	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/131	Re, C.J. April 29, 1980	Korvettes, Division of Arlen Realty & Development Corp.	73-12-03480, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/132	Re, C.J. April 29, 1980	Korvettes, Division of Arlen Realty Development Corp.	76-5-01097, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/133	Re, C.J. April 29, 1980	Herman Pecker & Co., Inc.	73-1-00292	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Stuffed animals
R80/134	Re, C.J. April 29, 1980	Topp Electronics, Inc.	74-7-01947, etc.	Export value	Values specified on entry papers by liquidating officer excluding all additions for currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/135	Watson, J. April 29, 1980	Hayim & Co.	R60/14005, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/136	Watson, J. April 30, 1980	Charmilles Corp. of America	77-5-00823	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar	Agreed statement of facts	Chicago Machine tools and accessories and parts

					converted to a dollar value at fixed rate of exchange as shown on special customs invoice in entry documents (the "claimed value"), 53% of difference between claimed value and appraised value		
R80/137	Watson, J. April 30, 1980	Charmilles Corp. of America	78-8-01432, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at fixed rate of exchange as shown on special customs invoice in entry documents (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts
R80/138	Watson, J. April 30, 1980	Charmilles Corp. of America	79-3-00443	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at fixed rate of exchange as shown on special customs invoice in entry documents (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Philadelphia Machine tools and accessories and parts

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/139	Watson, J. April 30, 1980	Hayim & Co.	231396A, etc.	Export value	Various appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Rugs
R80/140	Watson, J. April 30, 1980	Hayim & Co.	253076A, etc.	Export value	Various appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Rugs
R80/141	Watson, J. April 30, 1980	Hayim & Co.	255639A, etc.	Export value	Various appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Rugs
R80/142	Watson, J. April 30, 1980	Lipmans Imports Inc.	299002A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Brassieres
R80/143	Watson, J. April 30, 1980	Precision Knitting Accessories, Inc.	78-4-00502	Export value	Invoice unit values	Agreed statement of facts	New York Latch needles
R80/144	Re, C.J. May 8, 1980	J. E. Higgins Lumber Co.	R58/23470, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	San Francisco Japanese plywood

R80/145	Re, C.J. May 8, 1980	C. J. Tower & Sons of Buffalo, Inc.	R69/482	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is value found by appraising official as reflected on invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo Studebaker automobiles and optional equipment
R80/146	Re, C.J. May 8, 1980	C. J. Tower & Sons of Buffalo, Inc.	R69/493	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is value found by appraising official as reflected on invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo, Studebaker automobiles and optional equipment

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/147	Re, C.J. May 8, 1980	C. J. Tower & Sons of Buffalo, Inc.	R69/494	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is value found by appraising official as reflected on invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo Studebaker automobiles and optional equipment
R80/148	Re, C.J. May 8, 1980	C.J. Tower & Sons of Buffalo, Inc.	R69/496	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is value found by appraising official as reflected on invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo Studebaker automobiles and optional equipment

R80/149	Watson, J. May 9, 1980	Hayim & Co.	R60/2393, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/150	Watson, J. May 9, 1980	Hayim & Co.	R60/7336, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/151	Watson, J. May 9, 1980	Hayim & Co.	R62/1952, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/152	Watson, J. May 9, 1980	Hurricane International	R65/20210	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Rugs
R80/153	Watson, J. May 9, 1980	New York Merchandise Co., Inc.	R67/8970	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	San Diego Rugs
R80/154	Watson, J. May 9, 1980	New York Merchandise Co., Inc.	R65/17958, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Diego Rugs
R80/155	Watson, J. May 9, 1980	J. C. Penney	R60/18888	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles All tubing mats

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/156	Watson, J. May 9, 1980	J. C. Penney	R60/19749	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York All tubing mats
R80/157	Newman, J. May 14, 1980	Castelazo & Associates	R68/18010, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Los Angeles Machine tools and accessories and parts thereof
R80/158	Newman, J. May 14, 1980	Gehrig, Hoban & Co., Inc.	R68/14827, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof

R80/159	Newman, J. May 14, 1980	Gehrig, Hoban & Co., Inc.	R68/15514, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/160	Newman, J. May 14, 1980	Gehrig, Hoban & Co., Inc.	R68/15539, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/161	Newman, J. May 14, 1980	Gehrig, Hoban & Co., Inc.	R68/16920, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/162	Newman, J. May 14, 1980	Gehrig, Hoban & Co., Inc.	R69/3014, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/163	Re, C.J. May 27, 1980	Himalaya, Inc.	77-4-00667, etc.	Export value	Various appraised values shown on entry papers less those additions which were included in said appraised values to reflect currency revaluation	Agreed statement of facts	New York Miscellaneous merchandise
R80/164	Ford, J. May 28, 1980	B & K Instruments, Inc.	R66/15323, etc.	Export value	Invoice unit prices less, where applicable, the items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/165	Ford, J. May 28, 1980	B & K Instruments, Inc.	R68/7351, etc.	Export value	Invoice unit prices less, where applicable, the items specified on invoices as saved packing.	Agreed statement of facts	Cleveland Instruments and parts

R80/166	Ford, J. May 28, 1980	B & K Instruments, Inc.	R69/13564, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/167	Ford, J. May 28, 1980	B & K Instruments, Inc.	R70/4723, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/168	Re, C.J. May 29, 1980	Andrew Fisher Cycle Company, Inc.	75-4-00921	Export value	Appraised value less 11.4% addition for currency fluctuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Houston Bicycle parts
R80/169	Landis, J. May 29, 1980	Yoshida International, Inc., YKK Zipper, Inc., et al.	75-4-00793, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R80/170	Landis, J. June 3, 1980	B & K Instruments, Inc.	R66/23374, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/171	Landis, J. June 3, 1980	B & K Instruments, Inc.	R67/10964, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/172	Landis, J. June 3, 1980	B & K Instruments, Inc.	R68/12875, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/173	Landis, J. June 3, 1980	B & K Instruments, Inc.	R69/12706, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/174	Landis, J. June 3, 1980	Manhattan Novelty Corporation	278387-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars and leather cases
R80/175	Landis, J. June 3, 1980	J. C. Penney	R64/13333, etc.	Export value	Appraised unit values less 7.5% net packed	Agreed statement of facts	Seattle Tubing mats
R80/176	Landis, J. June 3, 1980	Radio Corporation of America	R66/26331	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R80/177	Landis, J. June 6, 1980	National Silver Co.	R61/1384	Export value	Various appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles Flatware
R80/178	Re, C.J. June 19, 1980	S. S. Kresge Co.	73-11-03191, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.

R80/179	Re, C.J. June 19, 1980	S. S. Kresge Co.	76-11-02520, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R80/180	Boe, J. June 19, 1980	Cluett Peabody, dba Van Raalte Co., Inc.	76-1-00045	Constructed value	$13,570.22—represented by cost of materials including accessories and supplies ($9,090.19), plus cost of labor ($2,411.77), plus an amount for overhead and profit ($1,929.41), plus packing ($138.85)	Agreed statement of facts	New York Gloves
R80/181	Re, C.J. June 19, 1980	Adorence Co. Inc.	76-10-02373, etc.	Export value	Various appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous
R80/182	Re, C.J. June 19, 1980	Holly Stores, Inc.	75-1-00039, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R80/183	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R62/11398, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Rugs

330-630 O - 81 - 22

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/184	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R63/1512, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/185	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R63/3674, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Baltimore Rugs
R80/186	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R63/8881, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Rugs
R80/187	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R64/3520, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Portland, Oreg. Rugs
R80/188	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R64/23437, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Rugs

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R80/189	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R65/4450, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Rugs
R80/190	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R65/12938, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Baltimore Rugs
R80/191	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R65/16183, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Portland, Oreg. Rugs
R80/192	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R65/16189, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Tampa Rugs
R80/193	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R65/16522, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Rugs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/194	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R65/22481, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Baltimore Rugs
R80/195	Maletz, J. June 19, 1980	Imported Rug Associates, Ltd.	R66/23394, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R80/196	Maletz, J. June 20, 1980	American Thermo-Ware Co.	267404-A, etc.	Export value	Various appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Binoculars
R80/197	Maletz, J. June 20, 1980	American Thermo-Ware Co.	R61/9758, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/198	Maletz, J. June 20, 1980	Astra Trading Corp.	R60/2161, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/199	Maletz, J.	Astra Trading Corp.	R60/16806	Export value			

					values		
R80/199	Maletz, J. June 20, 1980	Astra Trading Corp.	R60/18806, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R80/200	Maletz, J. June 20, 1980	Bruce Duncan Co., Inc., a/c Ezra Mallem & Son	R60/5437, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Rugs
R80/201	Maletz, J. June 20, 1980	Inter-Maritime Fwdg. Co., Inc.	262015–A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars and leather cases
R80/202	Maletz, J. June 20, 1980	New York Merchandise Co., Inc.	R60/6036, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Diego Rugs
R80/203	Maletz, J. June 20, 1980	Toyo Rug Co., Ltd.	R60/7237, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Rugs
R80/204	Maletz, J. June 26, 198	American Thermo-Ware Co.	R60/193, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/205	Maletz, J. June 26, 1980	Brother International Corp.	R64/946	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New Orleans Sewing machine head
R80/206	Maletz, J. June 26, 1980	Brother International Corp.	R65/9494, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Chicago Sewing machines and consoles
R80/207	Maletz, J. June 26, 1980	Bruce Duncan Co., a/c Belvedere Distributing Co.	R63/523, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machines
R80/208	Maletz, J. June 26, 1980	Bruce Duncan Co., Inc., a/c Ezra Mallem & Son	R61/2265, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles Rugs
R80/209	Maletz, J. June 26, 1980	Hurricane Import Co.	R65/1174	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Floor coverings
R80/210	Maletz, J. June 26, 1980	Hurricane Import Co.	R64/13846	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Rugs
R80/211	Maletz, J.	New York Merchan-	R60/15794	Export value	F.o.b. unit invoice prices	Agreed statement of	

R80/211	Maletz, J. June 26, 1980	New York Merchandise Co., Inc.	R60/15794	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Honolulu Rugs
R80/212	Maletz, J. June 26, 1980	New York Merchandise Co., Inc.	R61/6777, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Rugs
R80/213	Maletz, J. June 26, 1980	Selsi Co., Inc.	R61/9986	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values (binoculars) Unit value of U.S. $8.98, net packed (radios and cases)	Agreed statement of facts	New York Binoculars; radios and cases
R80/214	Maletz, J. June 26, 1980	Toyo Rug Co., Ltd.	R60/18231, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Rugs
R80/215	Maletz, J. June 26, 1980	Toyo Rug Co., Ltd.	R61/7233	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Boston Rugs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/216	Maletz, J. June 26, 1980	John L. Westland & Son, Inc., a/c Couri Murad & Co.	R58/28660	Export value	Various appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles Floor coverings
R80/217	Maletz, J. June 26, 1980	YKK Zipper Co. Inc. (Cal) et al.	75-2-00388, etc.	United States value	Equal to invoiced unit prices, net packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74

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